TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 97

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED JANUARY 9, 1928

(32,100)

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

G. C. and A. C. FULTON, Astoria, Oregon, for the Plaintiff in Error.

WOOD, MONTAGUE and MATTHIESSEN, Yeon Building, Portland, Oregon, for the Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,

District of Oregon,—ss.

To Metropolitan Life Insurance Company (a Corporation), GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Josephine Stipcich is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said Dis-

trict, this 9th day of December, in the year of our Lord one thousand nine hundred and twenty-four.

R. S. BEAN,
Judge. [1*]

[Endorsed]: Filed Dec. 9, 1925.

Due and legal service of the within citation on writ of error is hereby acknowledged at Portland, Oregon, this 9th day of December, A. D. 1925.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendants.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPHINE STIPCICH,
Plaintiff in Error,
vs.
METROPOLITAN LIFE INSURANCE COMPANY (a Corporation),
Defendant in Error.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America, To the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between Josephine

*Page number appearing at foot of page of original certified Transcript of Record.

Stipcich, plaintiff and plaintiff in error, and Metropolitan Life Insurance Company, a corporation, defendant and defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 9th day of December, 1925.

[Seal] G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Chief Deputy.

[Endorsed]: Filed December 9th, 1925. [2]

In the District Court of the United States for the District of Oregon.

March Term, 1925.

BE IT REMEMBERED, That on the 2d day of March, 1925, there was duly filed in the District Court of the United States for the District of Oregon, a transcript of record on removal from the Circuit Court of the State of Oregon for Clatsop County, the complaint and order of removal contained therein being in words and figures as follows, to wit: [3]

In the Circuit Court of the State of Oregon for Clatsop County.

JOSEPHINE STIPCICH,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY (a Corporation),

Defendant.

COMPLAINT.

The above-named plaintiff complaining of the above-named defendant for her cause of action alleges:

I.

That the defendant is, and during all the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws

of the State of New York, and is and was at all times duly authorized and licensed to and engaged generally in the life insurance business, and at and during all the times herein mentioned was duly licensed to engage in such insurance business in the state of Oregon.

That Raymond R. Barnhardt, residing in the City of Portland, County of Multnomah, State of Oregon, is now the duly appointed and acting attorney-in-fact for said defendant under and pursuant to the laws of the State of Oregon, upon whom service of summons and complaint in all actions may be had.

II.

That heretofore, and on March 26, A. D. 1924, Anton Stipcich made due application in writing to defendant for a life insurance and life insurance policy for his life.

That thereupon, and in consideration thereof, and the payment by said Anton Stipcich of the sum of $212.48 premium, which he then and there paid to defendant, and defendant then and there received from him, and in further consideration of the agreement on his part to well and truly pay defendant a like amount upon each 26th day of March thereafter until twenty (20) full years' premiums [4] should have been paid, or until the death of said Anton Stipcich, the said defendant, on the date last aforesaid executed and delivered to said Anton Stipcich, at Astoria, Clatsop County, Oregon, its certain Endowment 20 years' Life Policy, on the life of said Anton Stipcich, in

writing, wherein and whereby defendant agreed, for the consideration aforesaid, to pay to said Anton Stipcich on the 26th day of March, A. D. 1944, if he should be then living, or upon receipt at its home office of due proof of his death at any time prior to that date, to pay to plaintiff herein, who was then the wife of said Anton Stipcich and therein named as his beneficiary, the sum of $4,000.00.

That a copy of said life policy and application aforesaid is hereunto attached, marked Exhibit "A" and made a part of this complaint the same as if set forth herein.

III.

That after the execution and delivery of said life policy, and on the 8th day of April, A. D. 1924, the said Anton Stipcich died.

That prior to his death, said Anton Stipcich had duly performed all the terms and conditions of said policy of insurance on his part to be done and performed.

IV.

That at the time of the death of said Anton Stipcich, this plaintiff was his wife, and is now his widow, and is the beneficiary named in said policy of insurance.

V.

That heretofore, and on the 22d day of April, A. D. 1924, plaintiff furnished and delivered to defendant, on form furnished her by defendant for that purpose, due proof of the death of said Anton Stipcich, and the same was duly received

by defendant at its Home Office on that date. [5]

That plaintiff duly performed all the terms and conditions of said insurance policy on her part.

VI.

That upon the delivery to and the receipt by defendant at its home office, of said proof of the death of said Anton Stipcich, as aforesaid, plaintiff demanded payment to her, as beneficiary under such policy, of the said sum of $4,000.00, but defendant refused to pay the same, or any part thereof, and no part thereof has been paid.

That prior to this action, plaintiff many times demanded payment to her of said sum due her under said policy of insurance, but defendant has ever refused to pay same, or any part thereof, and has ever since the receipt of the proof of the death of said Anton Stipcich denied all liability and obligation under such policy, and has ever since wrongfully and in violation of its obligations thereunder wholly repudiated same.

VII.

That more than eight months have expired since plaintiff furnished and filed with defendant, and since defendant received at its home office, due proof of the death of said Anton Stipcich.

Therefore, plaintiff is entitled to recover from defendant, in addition to the amount due her under said policy as aforesaid, such sum as the Court or jury may adjudge reasonable as attorney's fees in this action.

That the sum of $750.00 is a reasonable sum as attorney's fees in this action.

VIII.

That plaintiff is entitled to interest on said sum of $4,000.00 from the 22d day of April, A. D. 1924, at the rate of 6% per annum until paid.

WHEREFORE, by reason of the premises, plaintiff demands [6] judgment against defendant for the sum of $4,750.00, together with interest on the sum of $4,000.00 thereof from April 22, 1924, at the rate of 6% per annum until paid, together with the costs and disbursements of this action.

G. C. & A. C. FULTON,
Attorneys for Plaintiff. [7]

EXHIBIT "A."

METROPOLITAN LIFE INSURANCE COMPANY.

Incorporated by the State of New York.
A Mutual Life Insurance Company.

ENDOWMENT 20 YEARS.

Annual Distribution of Surplus When Accrued.
Amount of Insurance—$4,000.
Payable in 20 years or at prior death.
Age—37. Annual Premium, $212.48.
Payable for 20 years or until prior death.
No. 010674 B. S.
Special Class. B.

IN CONSIDERATION

of the application for this policy, copy of which application is attached hereto and made a part hereof, and of the payment of the annual premium

of Two Hundred and Twelve Dollars and Forty-eight Cents, and of the payment of a like amount upon each 26th day of March hereafter, until twenty full years' premiums shall have been paid or until the prior death of the insured.

Promises to pay to the home office of the company in the city of New York to

ANTON STIPCICH

(herein called the Insured)

on the 26th day of March, 1944, if the insured be then living, or upon receipt at said home office of due proof of the prior death of the insured, to Josephine Stipcich, wife of the insured, beneficiary, Four Thousand Dollars, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year, upon surrender of this policy, properly receipted. [8]

This Policy is written with —— the right of the Insured to the *change the* Beneficiary, when such right has been reserved, and if there be no written assignment of this Policy on file with the Company, the Insured may (while the Policy is in force) designate a new beneficiary, with or without reserving right to change thereafter, by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable endorsement. Such change shall take effect upon the endorsement of the same on the Policy by the Company and not before. If any beneficiary shall die before the Insured the interest of such beneficiary shall vest in the Insured.

The Company shall be released from all liability under this Policy if the Insured shall, within one year from the issue hereof, become engaged in or connected in any manner with the manufacture or sale of ale, wine, beer or liquor, unless so engaged at the date hereof and so stated in the application for this Policy. If the insured within one year from the issue hereof die by his own hand or act, whether sane or insane, this Policy shall become null and void and the Company will return only the Premiums which have been received thereunder.

Restrictions.

No agent is authorized to waive forfeitures or to make, modify or discharge contracts, or to extend the time for paying a premium.

Provisions and Benefits.

The Provisions and Benefits printed or written by the Company on the following pages are a part of this contract as fully as if recited over the signatures hereto affixed.

In witness whereof, the Metropolitan Life Insurance Company has caused this policy to be executed this 26th day of March, 1924.

HALEY FISKE,
President.

JAS. S. ROBERTS,
Secretary.

SHARP,
Policy Registrar.

Form 729 B. S. C. Endowment Policy.
Special Class. B. Participating. [9]

PROVISIONS AND BENEFITS.

1. PAYMENT OF PREMIUMS:—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, or *or* before date due, of a receipt signed by the President, Vice-President, Secretary or Actuary of the Company and countersigned by said agent.

A grace of thirty-one days, without interest charge, shall be granted for the payment of every premium after the first during which period the insurance shall continue in force. If death occur within the days of grace the full premium for the then current policy year, or any unpaid portion thereof, shall be deducted from the amount payable hereunder.

The payment of a premium or installment thereof shall not maintain the Policy in force beyond the date when the next premium or installment thereof is payable except as herein provided.

At any anniversary of this Policy, on written request of the Insured, approved by the Company, at its Home Office, premium payments may be changed so as to be made payable annually, or in semi-annual or quarterly installments in accordance with the published rates in force at the date of issue of this Policy.

2. AGE:—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

3. INCONTESTABILITY:—This Policy (and the application therefor) constitutes the entire contract between the parties and, except for non-payment of premiums, shall be incontestable after two years from the date of its issue.

All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall avoid this Policy or be used in defense of a claim hereunder, unless it is contained in the written application therefor and a copy of such application is securely attached to this Policy when issued.

4. ASSIGNMENT:—No assignment of this Policy shall be binding upon the Company unless it be executed upon blanks furnished by the Company and filed with the Company at its Home Office in the city of New York. The Company assumes no responsibility as to the validity of any assignment.

5. OPTIONS ON SURRENDER OR LAPSE: Upon failure to pay any premium or any part thereof when due, this Policy, except as otherwise provided herein, shall immediately lapse. If, however, the lapse occur after three full years' premiums shall have been paid, the owner hereof, provided there be no indebtedness hereon, shall upon written request filed with the Company at its Home Office, together with the presentation of this Policy for legal surrender or for endorsement within three months from the due date of premium in default, be entitled to one of the following options:

First—A cash surrender value.

The Company in its discretion may defer the payment of the cash value for a period not exceeding ninety days after the application therefor is received by the Company.

Second—To have the insurance continued for a reduced amount of non-participating paid-up endowment insurance (including [10] any existing additions to the credit of the Policy), payable at the same time and under the same conditions as this Policy. Such paid-up insurance shall have an increasing cash surrender value equal to the full reserve at the date of surrender or a loan value up to the limit of the cash surrender value. Interest on loan under such paid-up insurance shall be payable annually in advance to the end of the policy year at the rate of six per centum per annum.

Third—To have the insurance continued for its original amount as term insurance in whole number of months from due date of premium in default, without participation and without the right to loan, and if the sum applicable to the purchase of such term insurance shall be more than sufficient to continue the insurance to the end of the endowment period named in the Policy, the excess shall be used to purchase in the same manner non-participating paid-up pure endowment (in even dollars for each one thousand dollars of insurance) payable at the end of the endowment period and on the same conditions as this Policy. The extended contract under this option may be surrendered for its full reserve at the date of surrender.

If the owner shall not, within three months from due date of premium in default, surrender this Policy to the Company at its Home Office for a cash surrender value or for endorsement for paid-up insurance or term insurance as provided in the above options, the policy shall be continued for a reduced amount of paid-up insurance as provided in the second option.

The values of these options, which are mathematical equivalents, have been calculated on the basis of the Metropolitan Special Class B. Table of Mortality, as adopted by the Insurance Department of the State of New York for computing reserves hereunder with interest at three and one-half per centum per annum (omitting fractions of a dollar per thousand of insurance) less a surrender charge of two and one-half per centum of the face of the Policy. These vales as computed produce the results set forth in the table herein at the end of the respective years.

Any indebtedness to the Company under this Policy will be deducted from the cash value; and such indebtedness will also reduce the amount of paid-up insurance or the amount continued as term insurance and any pure endowment payable at the end of the endowment term, in such proportion as the indebtedness bears to the cash value at due date of Premium in default. [11]

TABLES OF GUARANTEED LOAN VALUES AND SURRENDER OPTIONS.

Surrender Charge Having Been Deducted.

For each $1,000 of the amount of insurance

End of Year	Cash Value of Loan Value	Paid up Non-Participating Endowment Insurance	Non Participating Term Insurance Continued for Years	Months	Non Participating Paid up With Pure Endowment
3	$ 82	$130	4	7	$ 0
4	$ 112	$174	6	3	$ 0
5	$ 150	$228	8	0	$ 0
6	$ 188	$280	9	6	$ 0
7	$ 230	$334	10	10	$ 0
8	$ 272	$386	12	0	$ 2
9	$ 316	$436	11	0	$ 74
10	$ 362	$488	10	0	$146
11	$ 410	$538	9	0	$218
12	$ 460	$586	8	0	$292
13	$ 512	$636	7	0	$368
14	$ 568	$684	6	0	$444
15	$ 626	$732	5	0	$524
16	$ 686	$780	4	0	$606
17	$ 750	$828	3	0	$692
18	$ 820	$878	2	0	$782
19	$ 894	$926	1	0	$876
20	$1000	Insures			

Face amount of policy continued for period specified.
If the amount of Insurance is in excess of $1000, the Loan, Cash and Paid up Values, as shown in the table, will be proportionate.

The cash value or Loan Value at any time other than the end of the policy year (provided the full year's premium has been paid) shall be the value at the end of the current policy year, discounted at the rate of six per centum per annum.

Should surrender or default be at any other time than at the anniversary date of the Policy, the values for the preceding policy year shall be proportionately increased for the portion of the policy year for which premiums have been paid. The reserve for which funds are to be held upon this

Policy shall be computed upon the Metropolitan Special Class B. Mortality Table (as adopted by the Insurance Department of the State of New York), with interest at three and one-half per centum per annum. [12]

6. LOANS:—At any time after three full years' premiums have been paid and while this Policy is in force, the Company, on proper and lawful assignment and delivery of this Policy, will loan, on the sole security thereof, up to the limit secured by the cash surrender value as increased by the value of any paid-up additions. The loan will bear interest at the rate of six per centum per annum payable annually on the anniversary of the Policy. If interest be not paid when due, it shall be added to the principal, provided the entire outstanding indebtedness shall be within the limit secured by the cash surrender value; otherwise, non-payment of interest shall render the Policy null and void, after one month's notice shall have been mailed by the Company to the last known address of the insured and of the assignee of record, if any. The whole or any part of the indebtedness may be repaid at any time while the Policy is in force. At the option of the Company, the loan may be deferred for a period not exceeding ninety days after application therefor is received by the Company, unless such loan is to be applied solely to the payment of premiums due to the Company. After endorsement of the loan, the Policy will be returned to the borrower.

7. REINSTATEMENT.—If this Policy shall lapse in consequence of non-payment of any premium when due, it may be reinstated at any time upon the production of evidence of insurability satisfactory to the Company, and the payment of all overdue premiums with interest at six per centum per annum; any loan which existed at date of default, together with interest at the same rate to the date of reinstatement, to be, at the option of the owner on application for such reinstatement, either repaid in cash or continued as an indebtedness against the Policy.

PROVISIONS AND BENEFITS.

8. PARTICIPATION IN DIVISIBLE SURPLUS.—This Policy is a participating contract and the Company will annually ascertain and apportion any divisible surplus accruing hereon. The surplus as ascertained and apportioned shall, at the option of the owner, be either (a) paid in cash; or, (b) applied within the grace period toward the payment of any premium or premiums; or, (c), applied to the purchase of a participating paid-up addition to the sum insured; or, (d) left to accumulate to the credit of the Policy at such rate of interest as the Company may declare on such funds, and payable at maturity of the Policy or withdrawable in cash *or* any anniversary date of the Policy, the rate of interest to be not less than three and one-half per centum annually. If no other option is elected, the divisible surplus will be applied to the purchase of a paid-up addition

to the sum insured. Such paid-up addition may be surrendered at any time for its full reserve at the time of such surrender. The payment or apportionment of the divisible surplus shall not be conditioned upon the payment of the next premium. When in event of surrender or lapse this policy is continued as paid-up insurance or continued term insurance, it shall not share in the Divisible Surplus.

(See "Notice to Policy-holder" below.) [13]

OPTIONAL SETTLEMENTS.

9. **MODES OF SETTLEMENT:** — Having hereby reserved such right, the Insured, with right or revocation and change, by written notice to the Company at its Home Office, may elect to have the whole or any part of the net sum payable under this Policy, upon the death of the Insured, retained by the Company and paid out as provided below instead of in one sum. In case no such election has been made by the Insured, the beneficiary may so elect.

This policy is to be surrendered at maturity and a supplementary contract issued for the option elected.

These modes of settlement are, however, not applicable to a Policy which is payable to an assignee, to a corporation, to a co-partnership or association, or when the amount to be retained is less than one thousand dollars.

Subject to their general conditions and respective terms, these options are available to the owner of the Policy at its maturity as an Endowment.

OPTION 1. INTEREST PAYMENTS.—The payment of interest on the amount left with the Company at the rate which the Company may each year declare on such funds (but at no less rate than three and one-half per centum per annum), payable at the end of each year for a specified number of years or during the lifetime of the payee, and at the end of the specified period, or upon the death of the payee, by the payment of the amount retained, together with any accrued interest for the year then current, to the person designated in said notice, or, if there be no person so designated, to the executors, administrators or assigns of the payee.

OPTION 2. INSTALLMENT PAYMENTS.—The payment of equal annual or semi-annual installments covering a specified number of years, in accordance with the table below for each one thousand dollars of said net sum, the first installment being payable upon receipt of due proof of the death of the Insured. [14]

OPTION 2—INSTALMENT PAYMENTS

Number Years Specified	Amount of each of Annual Instalment	Amount of each Semi-Annual Instalment	Number Years Specified	Amount of each of Annual Instalment	Amount of each Semi-annual Instalment
1	$1,000.00	$504.34	16	$79.88	$40.38
2	508.60	256.74	17	76.38	38.60
3	344.86	173.98	18	73.26	37.02
4	261.04	132.72	19	70.48	35.62
5	214.06	107.98	20	67.98	34.38
6	181.32	91.52	21	65.74	33.24
7	158.02	79.76	22	63.70	32.22
8	140.56	70.96	23	61.86	31.28
9	127.00	64.12	24	60.16	30.44
10	116.18	58.66	25	58.62	29.66
11	107.34	54.22	26	57.20	28.94
12	99.98	50.50	27	55.90	28.28
13	93.78	47.38	28	54.68	27.68
14	88.48	44.70	29	53.56	27.12
15	83.80	42.40	30	52.54	26.60

[15]

OPTION 3. LIFE INCOME.—The payment of equal annual installments, for a fixed period of twenty years and for so many years longer as the payee shall survive, in accordance with the table below for each one thousand dollars of said net sum the first installment being payable upon receipt of due proof of the death of the Insured. [16]

OPTION 3—LIFE INCOME

Age of Payee at Death of Insured	Amount of each Instalment	Age of Payee at Death of Insured	Amount of each Instalment	Age of Payee at Death of Insured	Amount of each Instal ment	Age of Payee at Death of Insured	Amount of each Instal ment
10 and under	$43.24	25	$46.94	40	$53.24	55	$62.84
11	43.40	26	46.94	41	53.72	56	63.44
12	43.56	27	47.28	42	54.32	57	64.00
13	43.76	28	47.62	43	54.92	58	64.54
14	43.94	29	47.98	44	55.56	59	65.04
15	44.14	30	48.36	45	56.20	60	65.50
16	44.34	31	48.76	46	56.86	61	65.92
17	44.54	32	49.16	47	57.54	62	66.30
18	44.78	33	49.60	48	58.20	63	66.64
19	45.00	34	50.04	49	58.88	64	66.94
20	45.24	35	50.52	50	59.56	65	67.20
21	45.50	36	51.00	51	60.24	66	67.40
22	45.76	37	51.50	52	60.92	67 and over	67.50
23	46.04	38	52.02	53	61.58		
24	46.32	39	52.56	54	62.22		

Any installment payable under option 2 or option 3 which shall not have been paid prior to the death of the payee, unless otherwise directed in said notice, shall be commuted at three and one-half per centum compound interest and be paid in one sum to the executors, administrators or assigns of the payee.

In lieu of semi-annual installments under option 2, or annual installments under option 3, quarterly or monthly payment thereof in proportionate parts may be elected, provided that no such proportionate payments be for less than ten dollars.

Unless otherwise specified in the written notice making such election, the supplementary contract on legal release thereof may at any time be surrendered for the amount retained, with any accrued interest, under option 1, or for the commuted value of the stipulated installments yet to be paid under option 2, or for the commuted value of any of the first twenty installments then remaining unpaid under option 3; such commutation under this option (3) shall, however, in nowise affect the payments conditional upon the lifetime of the payee after the term during which the installments certain would have been payable; such commuted value under either option to be the amount as calculated by the Company on the basis of three and one-half per centum compound interest.

The sums payable under the foregoing options are based upon an assumed interest earning of three and one-half per centum, but if in any year the Company shall declare for that year, upon

funds held by it under such option, a greater interest rate than three and one-half per centum, the sum payable under option 2, or under option 3 within the fixed period of twenty years, shall be increased accordingly.

COPY OF APPLICATION ATTACHED HERETO.

NOTICE TO POLICY HOLDER.—The surplus accruing under policies of this class will probably not be sufficient to enable the Company to make a distribution of surplus under this policy before the end of the fifth year. [17]

APPLICATION TO THE
METROPOLITAN LIFE INSURANCE COMPANY
Incorporated by the State of New York. (2-22)

March 26 24.

0100574

PART A — Use Black Ink for Answers and Signatures.

Form 036K-4
Ordinary Dept.
Ed. Aug. 1921

1. Full name of person whose life is to be insured. (Print.) ANTON STIPCICH.
2. Residence. If in country, state R. F. D. Route.
   No. 562 Street. (Print.) Kensington Ave.
   City or Town—(Print.) Astoria.
   County—Clatsop. State—Oregon.
   How long have you resided at this address? 5 years.
   To what address shall premium notices be sent? Residence.
3. Place of birth. Town or City. Bakarac. State. Austria-Hungary.
4. Date of birth.
   Month—May. Day—23. Year—1887. Age nearest birthday. 37 years.
   (Be sure age and date of birth are in accord.)

Metropolitan Life Insurance Company. 23

5. Single, Married, Widower or Widow? Divorced or Separated?
Married.

6. Occupation. If more than one, state all. Nature of Employer's Business.
Contractor. Brick Mason and Concrete.

7. Exact Duties of Occupation.
Brick Mason and Supervision of Contract Work.

8. Any change in occupation contemplated? If yes, give particulars.
No.

9. Place of Business. (City, Street and No.) By whom employed?
562 Kensington. Astoria, Ore. Self.

10. Former occupation. (*With* the last ten years.)
Same.

11. Do you, with the next twelve months, contemplate journeying outside of the United States or Canada or making an ocean trip? If yes, state when, where to, for what purpose and for how long?
No.

[18]

13

Joseph Siffert vs.

12. Are you now engaged in, or subject to call for any form of Military or Naval service, or do you belong to any Military or Naval organization? If yes, give particulars.

No.

13. Have you any connection with or intention of engaging, either directly or indirectly in any form of aerial locomotion? If yes, give particulars.

No.

14. Amount of Insurance desired. $3000. Prem. Payable } Annually.

15. Plan of Insurance as designated in Rate Book.

20 Payment Life with Disability Provision and Double Indemnity Provision.

16. (a) Beneficiary in case of your death. (Print.) JOSEPHINE STIPCICH.

Relationship of Proposed Beneficiary—Wife.

Occupation—Housewife. Age—26.

P. O. Address—Same.

(b) Do you reserve the right to change the beneficiary at any time without the consent of beneficiary herein designated?

Yes.

Answer yes or no.

17. Are you now insured in this or any other Company? If yes, give particulars.

Name of Company.	Amount.	Kind of Policy.	Year Issued.	If in Metropolitan give Policy Nos.
Knights of Columbus.	$1000	W. L.		

18. Is the policy for which you are now applying to this Company intended to take the place of insurance carried with this or any other Company? If yes, give particulars.

No.

19. Is any application or negotiation for other insurance on your life now pending or contemplated? If yes, give particulars.

No.

20. Corrections and Amendments. (For Home Office use only.)

Policy issued in Special Class B.

Plan changed to 20 Year Endowment.

Sum insured—$4,000.

Policy issued without Disability Annuity.

Provision.

Policy issued without double indemnity.

[19]

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Joseph Stipech vs.

21. Have you ever applied to any Company or Association without receiving Insurance in the amount or on the plan applied for, or at your actual age, or at the normal premium therefor? If yes, give particulars.

Company or Association.	Year.	If not as applied for, in what respect different?	Declined or postponed.	If not advised, so state.

No.

To be completed in the case of a woman applicant, if ever married.

22. What are (in full) the sources of your income?
23. Is anyone entirely dependent on you for support? If yes, give particulars.
24. Number of children living, age and occupation of each.
25. Husband's *nmae*. (Print.)

    Age ———. Business ———.
26. In what Companies and for what amount is he insured in your favor?

    If in Metropolitan, give policy numbers. If not insured in your favor, state why not.

    Is application on his life being submitted?

IT IS UNDERSTOOD AND AGREED:

1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company, (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting *any benefits* any benefits under any policy issued hereunder.

3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application. [20]

4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant.

5. In case of apparent errors or omissions discovered by the Company in the foregoing application or in case the Company shall be unwilling to issue a policy upon the plan or in the amount applied for, the Company is hereby authorized to amend this application by noting the change in the space entitled "Corrections and Amendments" and to prepare and submit a policy on a different plan or in a different amount from that hereby applied for, and I hereby agree that my acceptance of such policy, as so submitted, accompanied by a copy of the application so amended, shall operate as a ratification of such changes or amendments.

Signed by Applicant and dated at Astoria, Oregon, this 17 day of February, 1924.

Witness to Signature:
HOFFMAN.

Signature of applicant:
ANTON STIPCICH.

[21] CONTINUATION OF THE APPLICATION.

APPLICANT'S STATEMENTS TO THE MEDICAL EXAMINER.

PART B — Use Black Ink for Answers and Signatures.

The spaces below are for the applicant's answers only. Nothing but his answers should be inserted.

Statements of or comments by Medical Examiner must be recorded in Part C.

	(Insert answers below)
1. What is your occupation? (exact duties)	Contractor—Brick—Concrete Construction.
2. Have you ever undergone a medical examination for insurance and failed to receive the exact amount or kind of policy applied for? If yes, give particulars and name of Company.	No.
3. Have you during the past year resided or been intimately associated with any person suffering from tuberculosis? If so, give particulars and precautions taken.	No.
4. Has any of your parents, grandparents, brothers or sisters now, or ever had tuberculosis, cancer, diabetes, epilepsy, insanity or other hereditary disease? If yes, give particulars.	No.
5. Have you ever been an inmate of, or have you ever received treatment at an asylum, hospital, sanitorium or cure? If yes, when, how long and for what?	Yes. St. Mary's Hospital, Astoria, Ore., Jan., 1922. Thirteen days—Perforating ulcer deodenum with gastro enterostomy.

6. Have you ever changed residence or traveled for your health? If yes, why and when.

No.

7. Have you ever received or applied for a pension or disability or compensation benefits from any government or from any municipal or private corporation or have you ever received or applied for any benefit under a policy of accident or health, workmen's compensation or fraternal insurance? If yes, state reason in full.

No.

8. Have you ever used opium, chloral, cocaine or other narcotic?

No.

9. (a) To what extent do you use beer, wine or other alcoholic beverages?

(a) Wine sometimes with meals.

(b) Have you ever used any of them to excess? If so, when and for how long?

(b) No.

10 Have you ever suffered from any ailment or disease of	"Yes" or "No"	Name of Each Ailment, Disease or Injury	No. of Attacks	Date	Duration	Severity	Results, and if within five years, name and address of every physician consulted.
(a) The Brain or Nervous System?	No						
(b) The Heart or Lungs?	No						Recovery Drs. A. A. Finch— Toivo Forrstrom Astoria, Ore.
(c) The Stomach or Intestines, Liver, Kidneys or Genito Urinary Organs?	Yes	Perforating ulcer duodenum	1 1922	Jan.	days 13	Operation	

(d) The Skin, Bones, Glands, Ears or Eyes? No.

11. (a) Have you ever had Rheumatism, Gout or Syphilis? No

(b) Have you ever had Paralysis or Insanity? No

(c) Have you ever had Diabetes, Pleurisy or Pneumonia? No

(d) Have you ever raised or spat blood? If so, give full details. No

(e) Have you ever had any Accident, Injury or Occupational Disease?	No					
(f) Have you ever had any Surgical Operation?	Yes	Gastro Enterostomy	1	Jan. 1922	13 days in hospital	Dr. T. Forrstrom, Astoria, Oregon
(g) Have you consulted a physician for any ailment or disease not included in your above answers?	No					

[23]

12. What physician or physicians, if any, not named above, have you consulted or been treated by, within the last five years and for what illness or ailment? If none, so state.	Name and Address of Physician	Date and Details of Illnesses	Results
	None		

13. Living Family Record

Age		Condition of Health of Each. (If not good, give details)		Age	(Dead) Cause of Death	How Long Sick	Year of Death	Ages Attained by Grandparents. (Living or Dead)
73		Good	Father					Father's Father:
76		Good	Mother					Dead. 88
30	44		Brothers					Father's Mother:
35	47	All Good	No. Living 6	21 yr.	Typhoid Fever	3 Days	1904	Dead. 80

39	51		No. Dead 2	6 mo. 10 day	Infant Infant	Mother's Father: Dead. 80
			Sisters			
40		Good	No. Living 2			Mother's Mother:
50		Good	No. Dead 1	53	Died in Austria Cause not Known 1919	Dead. 70

I HEREBY CERTIFY that I have read the answers to the questions in Part A hereof and to the questions in Part B hereof, before signing, and that they have been correctly written, as given by me, and that they are full, true and complete, and that there are no exceptions to any such answers other as stated herein.

Dated at Astoria, Ore., this 18 day of Feb., 1924.

Witness to Signature:

ELDRED B. WAFFLE, M. D.,

[24] Astoria, Ore.

NOTICE TO POLICY HOLDER.

Please Read Your Policy Promptly upon Its Receipt.

Do not fail to notify the Company at its Home Office when you change your address.

When writing District Office

or the Home Office give your Policy Number and state clearly Name, Residence, County and State.

Checks, Drafts or Money Orders

in payment of premiums should be drawn to the order of Metropolitan Life Insurance Company.

Privilege of voting for Directors.

The election of Directors of the Company is to be held in New York on the second Tuesday in April, 1923, and every second year thereafter.

The holder of this Policy while it remains in force, after one year from its date, will have a right to vote, either in person or by proxy or by mail. For particulars how to vote, apply to the Secretary, No. 1, Madison Avenue, New York City.

In the event of the death of the Insured,

the Claimant should promptly advise the Home Office, in New York, or the District Office through which premium payments have been made.

Pay nothing to any representative of the Company for preparation of claim papers. Deliver the Policy only to the Company's representative. The Company is glad to pay and there is no necessity for help or alleged influence in collecting.

It is not necessary to employ an attorney or any

other person to collect the insurance under this Policy, or to secure any of the benefits it provides. [25]

This policy shall not take effect unless or until the full premium has actually been paid in cash.

Payments are invalid unless made in exchange for an official Home Office receipt signed by the President, Vice-President, Secretary or Actuary of the Company and properly countersigned by an Agent of the Company.

METROPOLITAN LIFE INSURANCE COMPANY

ACKNOWLEDGES THE RECEIPT of $212.48, the first—annual premium under this Policy.

Countersigned March 19, 1924.

JAS. S. ROBERTS,
Secretary.

J. F. SCANLAN, Mgr.
(Signature)

Per JULIEN COBLENTZ.

The Company's agents have no authority to waive forfeitures, alter or amend the Contract, to accept premiums in arrears or to extend due date of such premiums. [26]

(Endorsed on Bank of Policy.)

District WILLAMETTE.

Number 0100574 S.

METROPOLITAN

LIFE INSURANCE COMPANY.

1 Madison Avenue,

NEW YORK.

Annual Distribution of Surplus When Accrued

Special Class B.

ENDOWMENT

20 YEARS

Insurance on the Life of ANTON STIPCICH.

Amount $4000

Annual Premium $212.48

Payable for 20 years or until prior death.

729 B. S. C.—2—20 [27]

State of Oregon,

County of Clatsop,—ss.

I, Josephine Stipcich, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action, and that the foregoing complaint is true, as I verily believe.

JOSEPHINE STIPCICH.

Subscribed and sworn to before me this 19th day of January, A. D. 1925.

[Notarial Seal.]

G. C. FULTON,
Notary Public for Oregon.

My commission expires Dec. 15, 1927.

[Endorsed]: No. 11510. In the Circuit Court of the State of Oregon for Clatsop County. Josephine Stipcich, Plaintiff, vs. Metropolitan Life Insurance Company (a Corporation), Defendant. Complaint. Jan. 19, 1925. J. C. Clinton, Clerk. By Max W. Pohl, Deputy. G. C. & A. C. Fulton, Attorneys for Plaintiff, Astoria, Oregon. [28]

BE IT REMEMBERED, That at a regular term of the Circuit Court, of the State of Oregon, for the County of Clatsop, begun and held at the County Courthouse in Astoria, in said County and State, on Monday, the 16th day of February, A. D. 1925, the same being the third Monday in said month, and the time fixed by law for holding a regular term of said court. Present: Hon. J. A. EAKIN, Judge, Presiding.

WHEREUPON, a term of said Court is begun and holden on Tuesday, the 24th day of February, A. D. 1925, the same being the 7th judicial day of said term of said court, and among other proceedings, the following was had, to wit:

Case No. 11510.

JOSEPHINE STIPCICH,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant.

ORDER FOR REMOVAL OF CAUSE.

Now at this time on motion of the defendant, it appearing to the Court that defendant has heretofore, and within the time prescribed by law, filed its petition and bond for the removal of this cause to the District Court of the United States for the District of Oregon, and said petition and bond being found sufficient in form and substance,—

IT IS NOW THEREFORE HERE ORDERED that this cause be and is hereby removed to the said District Court of the United States for the District of Oregon, and that the Clerk prepare a transcript of all records and files in the cause, and deliver the same to the defendant, or its attorney, on payment of the amount of his charges for the same.

J. A. EAKIN,

Judge.

Transcript of Record on Removal. Filed March 2, 1925. G. H. Marsh, Clerk. [29]

AND AFTERWARDS, to wit, on the 31st day of March, 1925, there was duly filed in said court, an answer, in words and figures as follows, to wit: [30]

[Title of Court and Cause.]

ANSWER.

Defendant herein for answer to the complaint in the above-entitled cause admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of the complaint.

II.

Answering paragraph II of the complaint defendant denies the same and every allegation thereof except as hereinafter expressly alleged and admitted.

III

Answering paragraph III, defendant admits that Anton Stipcich died on the 8th day of April, 1924, and denies every other allegation in said paragraph contained except as hereinafter expressly alleged and admitted.

IV.

Defendant admits the allegations of paragraph IV.

V.

Answering the allegations of paragraph V defendant denies same except as hereinafter expressly alleged and admitted.

VI.

Answering the allegations of paragraph VI defendant admits that plaintiff has frequently demanded payment of the sum of $4000.00, and that defendant has refused to pay the same, and no part thereof has been paid, and that defendant denies liability and obligation under the policy alleged in the complaint, and denies all other allegations in said paragraph.

VII.

Answering paragraph VII defendant admits that more than eight months have expired between the 22d day of April, 1924, and the filing of the complaint herein, and denies every other [31] allegation in said paragraph except as hereinafter expressly alleged and admitted.

VIII.

This defendant denies the allegations of paragraph VIII and every part thereof.

And for further and separate answer and defense, defendant alleges:

I.

That on or about the 17th day of February, 1924, Anton Stipcich signed and delivered to the agent of this Company at Astoria, Oregon, application for insurance, a substantially correct copy of which is set out in the complaint. Thereafter and on the 29th day of March, 1924, defendant, in reliance upon the statements contained in said application, and upon statements made by Anton Stipcich to the medical examiner of defendant at and after the date on which said application was signed, and

in reliance upon the correctness of said statements at the time of making thereof and thereafter and up to the delivery of the policy, as a true and correct representation of the state of health of said Anton Stipcich, and upon his obligation to disclose any material change in his condition up to the time of the delivery of the policy, and not otherwise, prepared and delivered a policy upon the life of said Anton Stipcich to a person acting for him, a substantially correct copy of which policy is set out in the complaint.

II.

That material statements of fact made in the said application and in the statements to the medical examiner by defendant, to wit: statements respecting the recovery of the said Anton Stipcich from a serious sickness previously suffered, and in respect to recurrence of the same and in respect to consultation of physicians and receiving treatment and examination for the same, were false and untrue, and were known by said Anton Stipcich and by the [32] plaintiff to be false and untrue at the time of their making, and the said Anton Stipcich and the plaintiff concealed from the defendant material and essential facts which it was the duty of the said Anton Stipcich and the plaintiff to disclose to the defendant, to wit: that said Anton Stipcich had suffered a serious recurrence of the illness from which he had previously suffered and was confined in a hospital on account of said illness, and at the time of the delivery of the policy the said Anton Stipcich and the plain-

tiff had arranged that he should return and he did soon thereafter return to a hospital for a serious and dangerous surgical operation upon himself in treatment of the said disease, in consequence of which disease and following the operation therefor said Anton Stipcich died on April 8th, 1924.

III.

That if said material and essential facts known to plaintiff and to said Anton Stipcich had been disclosed to defendant, or if the truth in respect to the same had been disclosed in whole or in any material part to defendant by plaintiff or by said Anton Stipcich, defendant would not have issued said policy of insurance.

IV.

That defendant had no knowledge or means of knowledge of said essential and material facts or of the falsity of the representations relating to the same or of the concealment thereof until after the death of said Anton Stipcich. The said false statements of fact and the concealment thereof were deliberately and wilfully and purposely made and committed by the said Anton Stipcich and by this plaintiff in order to obtain from defendant the policy upon which this action is brought.

V.

That after the death of said Anton Stipcich and on or about April 22d, 1924, plaintiff delivered to this defendant upon forms furnished by it, documents alleged to be proofs of death which were false in material particulars relating to the illness of said Anton Stipcich, and his consultation with

and employment of [33] physicians therefor prior to the delivery of the policy.

VI.

That defendant immediately upon learning the facts in this separate answer and defense set forth tendered to plaintiff the sum of $212.48, being the full amount on the first and only premium paid on behalf of Anton Stipcich upon the policy set forth in the complaint, and herewith brings and tenders the same into court for the benefit of plaintiff.

WHEREFORE, defendant having fully answered plaintiff's complaint prays to be hence dismissed, and for its costs and disbursements herein most wrongfully sustained.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, Raymond R. Barnhardt, make oath and say that I am agent and attorney in fact of the defendant in the above-entitled court and cause, and that the foregoing complaint is true as I verily believe.

R. BARNHART.

Subscribed and sworn to before me this 31st day of March, 1925.

[Seal]

RICHARD W. MONTAGUE,
Notary Public for Oregon.

My commission expires Jany. 14, 1929. [34]

United States,
District of Oregon,—ss.

I, Richard W. Montague, upon oath say that I served the within answer upon Messrs. G. C. and A. C. Fulton of Astoria, Oregon, on the 31st day of March, 1925, by depositing a copy thereof with the Clerk of this Court; said G. C. and A. C. Fulton not being residents of the city of Portland nor having an office therein, and not having designated by endorsement on the complaint or elsewhere a designation of the place in Portland where notices and copies might be served on them.

RICHARD W. MONTAGUE.

Subscribed and sworn to before me this 31st day of March, 1925.

[Seal] M. M. HARGROVE,
Notary Public for Oregon.

My commission expires Feb. 7, 1927.

Filed March 31, 1925. [35]

AND AFTERWARDS, to wit, on the 7th day of May, 1925, there was duly filed in said court, a reply, in words and figures as follows, to wit: [36]

[Title of Court and Cause.]

REPLY.

The plaintiff by this, her reply to the further and separate answer and defense set forth in de-

fendant's answer, admits, alleges and denies as follows, that is to say:

I.

Plaintiff replying unto paragraph numbered I of such answer admits that on or about the 17th day of February, 1924, Anton Stipcich signed and delivered to the agent of defendant company, at Astoria, Oregon, an application for insurance, a copy of which is set forth in the complaint, and it is also admitted that thereafter, and on March 29, 1924, the defendant executed and delivered to plaintiff the policy of insurance set forth in plaintiff's complaint, but as to all other matters and things set forth in said paragraph, this plaintiff denies.

II.

Replying unto paragraphs numbered II, III and IV of said answer, the plaintiff denies the same, and the whole thereof, and each and every allegation therein contained.

III.

Replying unto paragraph numbered V of said answer, it is admitted that after the death of said Anton Stipcich, and on or about April 22, 1924, plaintiff delivered to defendant upon forms furnished by it proof of the death of said Anton Stipcich, all in accordance with the terms of said contract, and not otherwise but as to all other matters and things set forth in said paragraph, this plaintiff denies.

IV.

Replying unto paragraph numbered VI of such

answer, this [37] plaintiff denies the same, and the whole thereof, and each and every allegation therein contained, excepting it is admitted that prior to this action, the defendant tendered to plaintiff the sum of $212.48, the premium theretofore paid by the insured for said policy of insurance, but as to whether or not defendant has paid said sum to this court, plaintiff has no knowledge or information thereof sufficient to form a belief.

WHEREFORE, plaintiff having fully replied to the matters set forth in said answer, prays judgment accordingly as demanded in her complaint.

G. C. & A. C. Fulton,
Attorneys for Plaintiff.

State of Oregon,
County of Clatsop,—ss.

I, Josephine Stipcich, being first duly sworn, deposes and say that I am the plaintiff in the above-entitled action, and that the foregoing reply is true, as I verily believe

JOSEPHINE STIPCISH.

Subscribed and sworn to before me this 6th day of May, A. D. 1925.

[Seal] G. C. FULTON,
Notary Public for Oregon.

My commission expires Dec. 15, 1927.

Copy mailed to defts. attorney, May 6th, 1925.

G. C. FULTON,
Attorney for Plff.

Filed May 7, 1925. [38]

AND AFTERWARDS, to wit, on Tuesday, the 28th day of July, 1925, the same being the 20th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [39]

In the District Court of the United States for the District of Oregon.

No. L.—9570.

JOSEPHINE STIPCICH,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

MINUTES OF COURT—JULY 28, 1925—JUDGMENT.

Now at this day come the parties hereto, by their counsel as of yesterday, and, the jurors impaneled herein being present and answering to their names, the further trial of this cause is resumed. Whereupon the plaintiff and the defendant having both rested their cases, the defendant moves the Court for a directed verdict in its favor; and the Court having heard the argument of counsel and being fully advised in the premises,—

IT IS ORDERED that the said motion be and the same is hereby allowed. Whereupon the jury,

at the direction of the Court, returns its verdict, in words and figures as follows, to wit:

"We, the jury in the above-entitled cause find for the defendant by direction of Court."

LEON HIRSCH,
Foreman.

Portland, Oregon, July 28 1925."

—which said verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that the said plaintiff take nothing by this action, that the said defendant go hence without day, and that said defendant have and recover of and from said plaintiff its costs and disbursements herein, taxed at $123.05. Whereupon on motion of the plaintiff,

IT IS ORDERED that she be and is hereby allowed to September 10, 1925, within which time to file her motion for a new trial herein. [40]

AND AFTERWARDS, to wit, on the 29th day of August, 1925, there was duly filed in said court a motion to set aside the verdict and for a new trial, in words and figures as follows, to wit: [41]

[Title of Court and Cause.]

MOTION TO SET ASIDE VERDICT AND FOR NEW TRIAL.

Comes now the above-named plaintiff by her attorneys, G. C. & A. C. Fulton, and moves the Court to set aside the verdict and judgment hereto-

fore rendered and entered in this cause, and to grant plaintiff a new trial, and for grounds of motion, alleges:

I.

The Court erred in the exclusion of, and in not allowing competent, relevant, material and proper evidence offered on behalf of the plaintiff, duly excepted at the time, and the exceptions allowed by the Court.

II.

The Court committed error in admitting incompetent, irrelevant, immaterial and improper evidence produced on behalf of the defendant, over the objections and exceptions of plaintiff duly made at the time and duly allowed by the Court.

III.

The Court erred in instructing the jury to bring in a verdict in favor of the defendant, to which action of the Court, the plaintiff then and there duly excepted, and the exception was allowed by the Court.

This motion is based on the record and files in said cause and the testimony and evidence produced at trial thereof.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

State of Oregon,
County of Clatsop.—ss.

Due service of the within motion is hereby accepted in said county and state, this 28th day of August, 1925.

WOOD, MONTAGUE & MATTHIESSEN.

Filed August 29, 1925. [42]

AND AFTERWARDS, to wit, on Monday, the 26th day of October, 1925, the same being the 97th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [43]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 26, 1925—ORDER DENYING MOTION FOR NEW TRIAL.

This cause was heard by the Court upon the motion of the plaintiff to set aside the verdict herein and for a new trial, plaintiff appearing by Mr. G. C. Fulton, of counsel, and the defendant by Mr. Richard W. Montague, of counsel. And the Court now being fully advised in the premises,

IT IS ORDERED that said motion be and it is hereby denied. [44]

AND AFTERWARDS, to wit, on the 26th day of October, 1925, there was duly filed in said court an opinion of the Court, in words and figures as follows, to wit: [45]

[Title of Court and Cause.]

OPINION.

Motion for New Trial.

Messrs. G. C. and A. C. FULTON, Astoria, Oregon, Attorneys for Plaintiff.

Messrs. RICHARD W. MONTAGUE and ERSKINE WOOD, Portland, Oregon, Attorneys for Defendant.

Portland, Oregon, October 26, 1925.

BEAN, District Judge:

This is an action on a policy of insurance on the life of Anton Stipcich, loss if any payable to his wife. The policy was issued March 26, 1924. The application therefor was made on the 17th day of February of the same year. In it the applicant stated that he had been operated on for "Perforating ulcer, duodenum," in January, 1922, but had recovered. To all other questions as to whether he had had certain diseases his answer was no.

Between the date of his application and the issuance of the policy, there was either a return of his old trouble or a manifestation of a new ulcer. On the day he applied for insurance, but before making the application, he consulted a physician (Dr. Forrstron, who previously had operated on him) for some trouble of the stomach, and was given a prescription, although this was not disclosed in the application. A few days later, and after the application, he again called upon the same physician in

regard to the matter, who suggested that an X-ray be taken. On the 7th or 8th of March, he consulted Dr. Sommers, of Portland, and was sent to the hospital for observation, where he remained five or six days, and during that time Dr. Sommers made a careful examination and diagnosis of his condition and told him that in his opinion he had a duodenal ulcer and advised surgical interference. About the 20th of the month he consulted and was examined by Dr. Stater, with the same result and advice. Soon after the delivery of the policy he went to the hospital, was operated on and died the 8th day of April.

On the trial the plaintiff offered to testify that after her husband had been examined by Dr. Sommers and before the [46] issuance of the policy she talked with Mr. Julian Coblentz, the agent of the defendant, who took the application, about the matter and told him that Dr. Sommers had recommended an operation, possibly for an ulcer, and that Coblentz suggested that her husband be examined by another physician.

Objection was sustained to the offer of proof and verdict directed in favor of the defendant.

The motion for a new trial raises substantially two questions: First, whether it was incumbent on the defendant company to show affirmatively that at the time it issued and delivered the policy, it did not know of the change in the condition of the health of the applicant, or was the burden on the plaintiff to show that it had such knowledge. And, second, did the Court err in ruling that the

proposed testimony of the plaintiff as to her conversation with Coblentz was inadmissible.

The application for insurance provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The representations and statements made by the *application* in his application as to the condition of his health, therefore, continued up to and were in effect at the time the policy was issued and delivered, and formed a part of the contract. The contract of insurance becomes effective from that time, and not before. Any material change in the health of the applicant between the date of the application and the issuance of the policy would void the policy unless known to the company. That there was such a change requires no argument. It is scarcely conceivable that a responsible insurance company would knowingly insure the life of one who was at the time suffering from acute intestinal trouble diagnosed by two competent physicians as a duodenal ulcer, and who had advised surgical interference. In any event, fair dealing would suggest that it be informed of such facts and thus be given an opportunity to determine whether it would nevertheless issue the policy. There is a presumption that the [47] assured's representations and answers to the questions in his application were true at the time they were made and would so continue down to the issuance of the policy. (14 Ruling Case Law, p. 1343; 33 Cor. Jur. 104.) But there is no presumption that he advised the com-

pany of the falsity of such statements or of the change in his health after the application, or that the continuing representations were not true. Indeed, if there is any presumption at all, it would seem to be to the contrary, for as a reasonable man, the applicant must have known that it was at least very doubtful whether the policy would issue if the company knew the actual condition of his health.

The burden of proof was on the company to show that there was a material change in the health of the applicant between the date of the application and the issuance of the policy and this burden is assumed. It was, however, the duty of the *application* to disclose to the company any such change, and in my judgment it was incumbent upon the plaintiff, after the showing made by the defendant, to prove that such duty had been performed before it is to be held that the company consented to insure the life of the applicant in the condition of his health at the time the policy was issued. May on Insurance, Sec. 190; 25 CYC. 797; Sun Mutual Ins. Co. vs. Ocean Ins. Co., 107 U. S. 485; Equitable Life Ins. Soc. vs. McElroy, 83 Fed. 631; Cable vs. U. S. Life Ins. Co., 111 Fed. 19; Society Life Ins. Co. vs. Boone, 159 Pac. 1080. To adopt the language of Judge Sanborn in Equitable Life vs. McElroy, *supra*:

> "The nature of the contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject matter, his own life, the ignorance of the in-

surance company, concerning it, and the necessary reliance in making the contract upon his good faith, honesty and truthfulness impose upon him the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally consummated. An intentional omission to discharge that duty perpetrates a plain fraud upon the company which necessarily avoids the contract."

If the company had been advised of the change in the applicant's health and thereafter issued the policy, it could not be heard to say that the policy was void on that account, but it was entitled to be fully informed on that subject, so that it might [48] determine whether it would complete the contract. It had a right to rely on the truth of the statements made in the application in the absence of other information and act accordingly, and if it had been advised of the change in the applicant's health, it seems to me that it was incumbent upon the plaintiff to show that fact, and not on defendant to prove a negative.

It is claimed by the plaintiff that notice to Coblentz of a change in the applicant's health after the application had been signed and forwarded to the company is to be imputed to the company. This would not follow unless Coblentz had either actual or ostensible authority to act for the company in the matter. Unless he had, mere knowledge on his part, uncommunicated to his principal, would not be binding upon it. Knowledge to an

agent is only knowledge to his principal in matters which are within the scope of his authority. Section 6435 Oregon Laws, which provides that one who solicits and procures an application for life insurance shall be regarded as an agent of the company, does not fix the scope of such agent's authority, and does not raise a special agent with limited authority to a general agent. (Mutual Life Ins. Co. vs. Hatch, 241 U. S. 613.) Coblentz was a soliciting agent with power to solicit insurance, take applications and collect premiums when due, but without authority to accept risks or issue policies, make contracts of insurance, or modify or waive any of the conditions of the contract. It so appears from the application and policy. It is declared in the application that the statements and answers in the application, together with the report of the medical examiner, shall form the basis of the contract of insurance if one is issued, and that no agent or any other person except the officers of the company have power, on behalf of the company, to make, modify or discharge any contract of insurance, or bind the company by making any promises respecting any benefits under any policy, and that any knowledge on the part of any agent as to any facts pertaining to the applicant shall not be considered as having been made or brought to the knowledge of the company unless stated in the application. [49]

The policy as delivered and accepted contains the provision that no agent is authorized to waive forfeiture or make, modify or discharge the con-

tract. These restrictions and limitations on the power and authority of the agent are such as the company had a right to make, and of which the assured had knowledge, and by which he and his beneficiaries are bound. (Iverson vs. Metropolitan Life, 91 Pac. 669; Nor. Assurance vs. Grand View Bldg. Assn., 183 U. S. 308; Madsen vs. Maryland Casualty Co., 142 Pac. 51.)

It follows, therefore, that the motion for a new trial should be overruled, and it is so ordered.

Filed October 26, 1925. [50]

AND AFTERWARDS, to wit, on Tuesday, the 27th day of October, 1925, the same being the 98th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [51]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 27, 1925—ORDER EXTENDING TIME TO PREPARE, SERVE AND TENDER BILL OF EXCEPTIONS.

Now at this day, upon motion of Mr. G. C. Fulton, of counsel for plaintiff,—

IT IS ORDERED that the plaintiff be and she is hereby allowed thirty days from this date within

which time to prepare, serve and tender her bill of exceptions herein. [52]

AND AFTERWARDS, to wit, on Friday, the 27th day of November, 1925, the same being the 22d judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [53]

[Title of Court and Cause.]

MINUTES OF COURT—NOVEMBER 27, 1925—ORDER EXTENDING TIME TO FILE OBJECTIONS TO BILL OF EXCEPTIONS.

Now at this day, upon motion of Mr. Richard W. Montague, of counsel for the said defendant,—

IT IS ORDERED that the defendant be and it is hereby allowed thirty days from this date within which to file its objections to the plaintiff's proposed bill of exceptions. [54]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [55]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Honorable ROBERT S. BEAN, Judge of the District Court Aforesaid, and Before Whom the Above-entitled Cause was Tried and Determined:

Comes now Josephine Stipcich, by her attorneys, G. C. & A. C. Fulton, and respectfully shows that on the 28th day of July, A. D. 1925, the Court directed a verdict in the above-entitled action against your petitioner and in favor of the above-named defendant Metropolitan Life Insurance Company, and upon said verdict, a judgment was entered on the 28th day of July, A. D. 1925, against your petitioner and in favor of the above-named defendant.

Your petitioner feeling herself aggrieved by the said verdict and judgment entered thereon as aforesaid herewith petitions the Court for an order allowing her to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of

security to be given by plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

G. C. & A. C. FULTON,
Attorneys for Petitioner in Error.

Writ of error granted this 9th day of December, A. D. 1925, and also the amount of bond or security to be given by the [56] plaintiff in error may be as follows:

Supersedeas bond fixed at $500.00.

R. S. BEAN,
District Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition for writ of error is hereby accepted in said County and State, this 9th day of December, A. D. 1925.

RICHARD W. MONTAGUE,
Of Attorneys for Defendant.

Filed December 9, 1925. [57]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [58]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

The plaintiff in error in this action in connection with her petition for a writ of error makes the following assignments of error, which she avers occurred at the trial of said cause and upon which she relies to reverse the judgment entered herein, to wit:

(1) The Court erred in sustaining and in not overruling the objection of counsel for defendant to and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

> Q. Now, after you got that, after Dr. Sommer had told you that your husband may, or he may not have an ulcer, did you have any talk with Mr. Coblentz, of the insurance company? If so, state what it was.

(2) The Court erred in denying and rejecting the following offer of proof, being an offer of proof made in response to the question set forth in Assignment of Error No. 1 hereof, and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf to produce the following testimony, to wit:

> That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: That after her husband,

Anton Stipcich, had been examined and X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the doctor had recommended an operation, possibly for an ulcer; that the doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time, Mr. Julien Coblentz was agent for the defendant company. [59]

(3) The Court erred in sustaining and in not overruling the objection of counsel for the defendant to, and in not permitting plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

Q. Who suggested that you should go to see Dr. Coffey?

(4) The Court erred in denying and rejecting the following offer of proof and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to testify to the following facts, being the offer of proof in response to the question set forth in Assignment of Error No. 3 above, namely

If the witness were permitted to answer that question, she would state that her husband went to Dr. Coffey at the suggestion of Mr. Coblentz.

(5) The Court erred in granting and in not overruling the motion of defendant for an order directing the jury to return a verdict in favor of the defendant.

(6) The Court erred in taking from the jury the right to pass upon the issues of fact in this case.

(7) The Court erred in instructing the jury to bring in a verdict in favor of the defendant and against the plaintiff.

(8) The Court erred in entering a judgment in favor of the defendant and against plaintiff.

(9) The Court erred in adjudging and declaring the following to be the law of the case, namely:

> It seems to me, that in view of this application and policy and the fact that it appears on the face of the application that that was the intention, that statements made to or by an agent should not be binding on the company unless contained in the application, that mere knowledge by a soliciting agent who had no authority to deliver the policy or issue it, and whole duty it was simply to take the application and forward it to the Home Office, the Manager, or somebody that had authority to issue it, that notice to such [60] an agent did not bring that notice to the company. I may be in error, but that is my view of the law at this time, therefore I sustain this objection.

(10) The Court erred in declaring and adjudging the following to be the law of this case, namely:

> This policy, or this application provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The policy was issued on the 26th of March. The date of delivery has not been shown by the testimony,

but assuming that it was delivered on that day —but there is no proof on that subject—I understand the law to be, and so stated on the demurrer, that if this application and policy were to take effect from the date of its issue, the obligation of the applicant to make full disclosure of his physical condition continues to the completion of the contract, that would be down to the issuance of the policy, and any material change in the condition of his health before the consummation of the contract, before the issuance of the policy in this case, should have been reported to the company.

Now the evidence shows, and I don't see that there is any room for controversy about it, that soon after this application was made the applicant appeared here in Portland and consulted Dr. Sommer about his physical condition, and after an examination, and being under observation for five or six days, the doctor advised that he probably had an ulcer, or concluded that he probably had an ulcer, and so advised the applicant, and advised him to submit to an operation. Now he wasn't satisfied with that, so he went to another physician along about the 20th of March, and obtained the same information, and that certainly was enough to advise him of the change in the condition of his health, and it was information that I think he was obliged and in duty bound to communicate to the insurance company, because if he had [61] communicated it to the company that

after the application he had consulted a physician and been advised he was afflicted with an ulcer, and to submit to an operation, it would be up to the company to determine whether or not it would issue the policy, but it was his duty to communicate that fact to the company, and not having done so, or if he didn't do so, it would seem to me that would void the policy.

Now on the question of whether he did or not, there is no direct evidence, but there is evidence by the manager at Astoria, that no such communication was made to him, or through his office to the company, and in addition to that the company issued and delivered the policy, based upon the original application, and upon the original application, and attached to the policy were particular declarations that it was acting upon that application alone. So that I think it would be futile for the Court to hold that there was any proof on this contention that this condition of the applicant had been in fact communicated to the company. So if I am right in my interpretation of the law covering contracts of insurance of this kind, it seems to me there is no escape from the conclusion that the motion for a directed verdict in favor of the company should be allowed. An insurance company has a right under the law to be advised of the condition of the health of its applicants at the time it makes the contract, and that was not done in this case. Whatever the purpose of this gentleman may

have been in these inquiries at the time and under the circumstances, and not communicating to the company his condition, but waited until after the policy had been issued before he went to the hospital for the operation, is wholly beside the question involved in this case. So I take it that under the record as it appears, the Court has no alternative but to allow this motion.

WHEREFORE, plaintiff in error prays that the judgment [62] of said Court be reversed.

G. C. & A. C. FULTON,
Attorneys for Plaintiff in Error.

State of Oregon,
County of Clatsop,—ss.

Due service of the within assignments of error is hereby accepted in said County and State, this 9th day of December, A. D. 1925.

RICHARD W. MONTAGUE,
Attorneys for Defendant in Error.

Filed December 9, 1925. [63]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit: [64]

No. L.-9570.

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Josephine Stipcich, plaintiff, and Vince Bakotich and Frank Patton, as sureties, are held and firmly bound unto the defendant Metropolitan Life Insurance Company, in the full sum of $500.00 to be paid to it, its attorneys, successors and assigns, to which payment well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Signed and dated this 9th day of December, A. D. 1925.

WHEREAS, lately at a regular term of the District Court of the United States for the District of Oregon, in an action pending in said court between Josephine Stipcich, as plaintiff, and the Metropolitan Life Insurance Company, a corporation, as defendant, cause No. L.-9570, on the law docket of said court final judgment was rendered against the said plaintiff Josephine Stipcich for the sum of $500.00 costs and disbursements of such action, and the said plaintiff Josephine Stipcich has obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment of said court in the aforesaid action, and a citation duly directed to the Metropolitan Life Insurance

Company, defendant in error, citing it to be and appear before the United States Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, according to law, within thirty (30) days from the date hereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION is such that if the said Josephine Stipcich shall prosecute her writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and effect. [65]

IN WITNESS WHEREOF, we have hereunto set out hands and seals, this 9th day of December, A. D. 1925.

JOSEPHINE STIPCICH. (Seal)
By G. C. FULTON,
Her Attorney.
FRANK PATTON. (Seal)
V. F. BAKOTICH. (Seal)

United States of America,
District of Oregon,
County of Clatsop,—ss.

We, Vince Bakotich and Frank Patton, whose names are subscribed to the within undertaking as sureties, being severally duly sworn, each for himself says: That I am a resident and freeholder within the State of Oregon, and am not a counsellor ar attorney at law, sheriff, clerk or other officer of any court, and am worth the sum of One Thou-

sand Dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

FRANK PATTON.
V. F. BAKOTICH.

Subscribed and sworn to before me this 9th day of December, A. D. 1925.

[Seal] G. C. FULTON,
Notary Public for Oregon.

My commission expires—

Approved this 9th day of Dec., A. D. 1925.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within undertaking on appeal is hereby accepted in said county and State, this 9th day of December, A. D. 1925.

RICHARD W. MONTAGUE,
Of Attorneys for Defendant.

Filed December 9, 1925. [66]

AND AFTERWARDS, to wit, on the 10th day of December, 1925, there was duly filed in said court, a bill of exceptions, in words and figures as follows, to wit: [67]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that at the trial of this cause on the 27th day of July, A. D. 1925, the

Honorable Robert S. Bean, Judge presiding, the plaintiff appearing in person and by her attorneys, G. C. & A. C. Fulton, and the defendant by its attorneys, Wood, Montague & Matthiessen, a jury was duly empanelled, and the following proceedings were had:

LIFE INSURANCE POLICY.

The plaintiff then offered and there was received and read in evidence the life insurance policy described in plaintiff's complaint, its execution and delivery being admitted.

NOTE: A copy of this policy is attached to plaintiff's complaint, hence, is made a part of this bill of exceptions by reference to the copy attached to the complaint.

TESTIMONY OF JOSEPHINE STIPCICH, FOR PLAINTIFF.

JOSEPHINE STIPCICH, a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

I am the plaintiff in this case, and the beneficiary named in the life insurance policy described in the complaint. The insured Anton Stipcich was at the time of the issuance of the policy my husband. I was married to him about ten years ago.

TESTIMONY OF JULIEN COBLENTZ, FOR PLAINTIFF.

JULIEN COBLENTZ, a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

My name is Julien Coblentz. I live at Astoria, Oregon. I represent the defendant Metropolitan Life Insurance Company and have been representing it for something over five years. I recall the policy in this case. I received it from the assistant manager in charge of the company's office at Astoria, Oregon, to be delivered to Anton Stipcich, the insured. I was the one who solicited and obtained the application for the policy, and [68] following the regular custom, when the policy arrived, it was placed in my hands for delivery to the insured.

Thereupon the plaintiff offered and there was received in evidence proof tending to prove that proof of the death of the insured Anton Stipcich was duly furnished the defendant on forms prepared by it and by it received on or about the 17th day of April, 1924.

Proof of death received in evidence, marked Plaintiff's Exhibit 2A, 2B and 2C, and are made a part of this bill of exceptions. By stipulation the original are to be sent up and and not printed.

Cross-examination.

After we were informed of Mr. Stipcich's death, Mrs. Stipcich was in Portland, I believe at the time, and I called at one of her brothers and

(Testimony of Julien Coblentz.)

asked her nephew when she would return and be ready to complete the proofs of death, and at a later date, on the day before we made these papers out, she phoned me that she was ready to see us.

TESTIMONY OF W. W. BANKS, FOR PLAINTIFF.

W. W. BANKS, a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

I am a regularly licensed and practicing attorney-at-law, residing at the City of Portland, Oregon, and have been engaged in such profession for the last twenty-five years.

Thereupon, counsel for plaintiff propounded to him the following question:

Q. Mr. Banks, this is an action brought by Josephine Stipcich, the beneficiary under the twenty year life policy issued to her husband during his life time. The amount involved is four thousand dollars. The company admits the execution of the life policy, but denies its obligation to pay it, based upon, I guess, perhaps, two grounds—I think only one—well, two grounds. The first is that the insured made a false statement in his application for the policy. They also make a further contention that between the date the application was signed by the insured, and the date of the delivery of the policy to the insured, the insured had [69] suffered a severe change in his health, which he failed to report to the company. Now I

(Testimony of W. W. Banks.)

would like to have your judgment as to what you would consider reasonable attorney's fee for the plaintiff in an action of that kind, involving that amount of money, with counsel eminent as they are, in behalf of the defense.

A. From my experience, I will say that in a contested case of this nature, involving four thousand dollars, with counsel of experience, that a fee of twenty per cent of the amount involved up to five thousand dollars would be a reasonable fee.

Thereupon, the plaintiff rested.

TESTIMONY OF JULIEN COBLENTZ, FOR DEFENDANT.

The defendant, in order to sustain the issues on its part, called as a witness on its behalf, JULIEN COBLENTZ; he having been previously sworn, testified as follows:

I am agent for the defendant Metropolitan Life Insurance Company, residing at Astoria, Oregon, an agent unattached. It is my duty to solicit for insurance, collect premiums when they are due. I have nothing to do with the acceptance of risks or the issuance of policies.

Thereupon, he was asked by counsel for defendant the following questions:

Q. Do you recall the circumstances of the application for this policy? A. Yes.

Q. You may state what they were, and when?

A. Well, I might preface my remarks by stating

(Testimony of Julien Coblentz.)

that for a period of about seven months I was on disability. I had been injured in an automobile accident, and was not actively employed by the company, was what is known on disability. On the afternoon of February 16th, however, of 1924, I was at the office of the company at Astoria, and while there Mr. Stipcich and Mrs. Stipcich and their little boy called at the office, and Mr. Stipcich told me that he was now ready to apply for the insurance for which I had been canvassing him for a matter of some two years. [70] And I invited him to have a seat so he could write out the application. He said that he had no time just then, but invited me to call at his home the next day, which was Sunday. The next afternoon, after dinner, I called at his residence in company with Mr. Hoffman. Mr. Hoffman took me there in his car.

Q. Mr. Hoffman is who?

A. Assistant Manager at Astoria. Mr. Hoffman took me there in his automobile, and we discussed several plans of insurance, and different kinds of insurance, and we attempted to sell Mr. Stipcich a five thousand dollar policy, but both he and his wife thought the amount of premium involved was more than they could handle at that time. But we finally agreed on an amount of three thousand dollars, and that was Sunday, February 17, 1924. The next day, by arrangement—on February 18th Mr. Stipcich was examined by our examiner at Astoria, Dr. Waffle, E. B. Waffle.

(Testimony of Julien Coblentz.)

Q. I hand you document labeled "Application to the Metropolitan Life Insurance Company," and ask you if that is—I think that is called Part A; the first page inside of this is the application which was made out by Mr. Stipcich on that date.

A. Yes.

Q. This is his signature? A. Yes.

Q. And that is the signature of Assistant Manager Hoffman? A. Yes.

Q. How do you know that was the date?

A. Because the application was written and dated by myself at the time.

Q. You know at the time that that was the true date? A. Yes, sir.

Mr. MONTAGUE.—We offer this document in evidence, the original application; a copy set out in the pleadings, but the original instrument is of course admissible.

The said document was admitted in evidence and marked [71] Defendant's Exhibit "B," but a copy thereof being attached to the complaint is but made a part hereof by reference to such exhibit.

The original application was for Three Thousand Dollars. The policy was written for Four Thousand Dollars. This change was made at the request of Anton Stipcich, the insured.

TESTIMONY OF ARTHUR A. HOFFMAN, FOR DEFENDANT.

ARTHUR A. HOFFMAN, a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Arthur A. Hoffman.)

I am assistant manager of the defendant Metropolitan Life Insurance Company, at its office at Astoria, Oregon, and was such during all of the transactions involved in this action. My duties, function and instructions in regard to such business are in writing partly and partly verbal.

Thereupon, counsel for defendant asked the said witness the following question:

Q. What were your duties? What did you do?

To which question, the plaintiff, by her attorneys, objected, upon the ground that the same was immaterial and irrelevant; that the writing was the best evidence, and further objected to the witness answering the said question unless he produced the written orders and instructions; but the Court overruled said objection, and directed the witness to answer the same. To which ruling of the Court, the plaintiff, by her attorneys, excepted, and an exception was allowed by the Court.

A. They varied in carrying out the business of the company. We have circular letters that come in continuously, which cover our instructions, written and verbal; from time to time they may change. It is to act as the company's head agent at Astoria, in a few words, and Mr. Coblentz is one of the men; I have also three others, and I get my instructions from both Portland, San Francisco and New York.

I have no authority to pass on applications for policies or passing on the medical examination. Said witness further testified as follows: [72]

(Testimony of Arthur A. Hoffman.)

Q. Do you know how it happened that the application in this case, which was for Three Thousand Dollars, resulted in a policy for Four Thousand Dollars?

A. The policy was changed. The plan and class was changed by the head office, and notice to that effect was sent down and to be presented to Mr. Stipcich, whether he would accept it or not. This was turned over to Mr. Coblentz and he presented it to Mr. Stipcich. He also wrote a letter to San Francisco that it was Mr. Stipcich's desire to have it increased to four thousand dollars. This is as much as I know.

TESTIMONY OF HENRY G. SARPOLI, FOR DEFENDANT.

HENRY G. SARPOLI, a witness on behalf of the defendant, being first duly sworn testified as follows:

My name is Henry G. Sarpoli. I reside at Astoria, Oregon. I am by occupation a pharmacist, duly registered and licensed as such and engaged in business at Astoria, Oregon. On February 16, 1924, I filled a prescription given by Dr. Forsstrom to Anton Stipcich. I have that prescription in my possession now. By agreement the witness read the prescription to the jury, which was as follows:

A. Tony Stipcich, 562 K Avenue. Acid Hydrochloric dilute. This is diluted hydrochloric acid. Lactopepsin 15 grams. That is 15 grams dilute hydrochloric acid and 15 grams lactopepsin. Gly-

(Testimony of Henry S. Sarpoli.)

cerin 30 grams. Distilled water 120 grams and tincture of magnesia 8 grams. That is a solution of morphine sulphate.

Q. Morphine sulphate?

A. Yes, the same thing as morphine.

Q. And generally known as morphine.

A. Yes, and the direction is a teaspoonful three times a day.

TESTIMONY OF DR. WAYNE J. SLATER, FOR DEFENDANT.

DR. WAYNE J. SLATER, a witness on behalf of the defendant, after being first duly sworn testified as follows:

I am a regularly licensed and practicing physician residing and practicing my profession at Portland, Oregon, since July, 1923. [73] I am a graduate of Harvard Medical School and was associated during the year 1920 with Dr. Robert C. Coffey, who has offices in the Stevens Building, and it was a part of my duty to examine the cases that come to see Dr. Coffey, that is, I did substantially during the year 1924. I am now practicing independently. When I made an examination I made a written record thereof. These records are all made at the time of the transaction, and I wrote up the findings and then Dr. Coffey came in, and the X-ray man recorded his findings at the time he was there, and these records are made up under my personal supervision. Dr. Coffey was consulted by Anton Stipcich, the party named in the policy of insur-

(Testimony of Dr. Wayne J. Slater.)

ance in this case, during the month of March, 1924. He came in first on March 20, 1924, and he was there also on the 21st of the same month, and he was again in the office for examination on the 29th of the same month, and examinations were made at that time, and I have all the records that were made at that time. From these records, it appears that Mr. Stipcich was a man 37 years old, married, a bricklayer, born in Austria. The first time I examined him, he showed me a scar in the right rectus incision where he had an operation two years ago for perforated gastro ulcer, peptic ulcer, which was healed, so he said. The abdomen showed a tenderness in the epigastrium, which is over the stomach area and to the right—in the right hypochondrium region, with food masses felt. The balance of the physical examination is negative except two scars on his left knee where he was operated on for an antrum when he was a young boy. He had no further complaint after the operation at all. Six weeks before he came to us, however, his old trouble returned. That was his statement to me. He said he had no further trouble after his operation two years ago until six weeks before our interview, and then he had a recurrence of the pain which he had prior to the operation two years ago. He gave an ulcer history. In other words, six weeks before he came into the clinic. An X ray examination and picture was taken of [74] him and the X ray disclosed an ulcer of the pylorus. That is a report of the

(Testimony of Dr. Wayne J. Slater.)

screen, which is more important than the X-ray picture in ulcer of the stomach. An X-ray picture of an ulcer of the stomach is not worth a quarter what the screen is. The screen is a moving picture. You give this patient some barium and watch the barium as it passes down the esophagus into the stomach and until it leaves the stomach; then you can see any changes in the outline of a stomach while the barium is in the stomach The X-ray picture is just simply a picture and only shows just the stomach at one stage. There are continuously peristaltic waves over the upper stomach down towards the pylorus. You can watch the changes under the screen. You are looking at the stomach all the time while here the X-ray picture only shows one phase. Barium is merely given because it is opaque to the X-ray and you can see it easily, and so the barium in the stomach shows the outline of the stomach; shows any deformity in the stomach; shows whether a notch, or indentation, which you usually have in an ulcer; also whether any spasticity of the muscles or not. I mean by spasticity increased tonus in the muscles of the stomach. The muscles are more tight than usual. They do not relax well and generally they stay contracted more.

Now the fluorescent screen shows a moving picture of the stomach with the barium in it and shows scars or solid masses, holes or little projections from the stomach or into the stomach, and these masses or holes or projections indicate the

(Testimony of Dr. Wayne J. Slater.)

presence of something in the nature of a tumor or ulcer.

The X-ray man made a hand picture of the incidents described by the witness.

Thereupon counsel for defendant offered the same, and the same was received in evidence and marked Defendant's Exhibit "E."

NOTE.—This exhibit being a pen picture it is deemed advisable to forward the same separately to the court as it is not of sufficient importance to print the same. [75]

Q. Did you advise Mr. Stipcich on the strength of these X-rays?

A. Well, on that and the history, yes, and the findings.

Q. The result of the entire examination?

A. Yes.

Q. Of which this formed a part? A. Yes.

Q. Now, you may state what result—in as non-technical language as you can—what the result of the examination and X-rays was as to the condition of Mr. Stipcich at the time the examination was made?

A. We made a diagnosis of a peptic ulcer at the time of his examination; that was the result of the examination. That is what you wanted to know—what was the matter with him?

Q. Did the examination show anything with respect to the obstruction of the stomach and the passing out of its contents?

A. Well, the contents of the stomach didn't pass out as freely as normally.

(Testimony of Dr. Wayne J. Slater.)

Q. What is the technical term of that stoppage or obstruction of the contents?

A. That would be obstruction—is the common term. There was—the contents of the stomach didn't pass out as freely as normally.

On redirect examination, said witness further testified, in answer to interrogatories propounded to him by counsel for defendant, as follows:

Q. In your examination—did you have an opinion, on your examination as to whether the man at that time had an ulcer or not? A. Yes.

Q. And that opinion was?

A. That he had an ulcer.

Q. Could you tell whether the ulcer was a new one or an old one? A. No. [76]

Q. What is the relation of the pyloric part of the stomach and the duodenum to the other? Will you explain that briefly?

A. The pyloric end of the stomach connects the duodenum and the duodenum is the beginning of the small intestines. The pyloric end of the stomach is tissue—consists of the same kind of tissues, practically, but is a valve there, a pyloric valve, which indicates the separation between the two; they are all made of smooth muscles which give a peristaltic action to the areas, and connective tissues, blood vessels and nerves, and the epithelim which lines the stomach is continued down into the stomach, although the esophagus, the duodenum and the stomach are different.

Q. Are you always able to tell definitely and cer-

(Testimony of Dr. Wayne J. Slater.)

tainly whether an ulcer disclosed on examination is in the duodenum or stomach?

A. You can't always be sure exactly where an ulcer is, I mean within a very short distance, because according to this record, it is right at the juncture of the two, the record shows.

TESTIMONY OF MARGARET E. TYNON, FOR DEFENDANT.

MARGARET E. TYNON, called by defendant and duly sworn, testified that she was the record librarian at St. Vincent's; kept a record of the examinations made of patients; and produced a record which shows that Anton Stipcich was in the hospital from March 9th to March 24th, 1924, had X-rays made and then was discharged from the hospital.

TESTIMONY OF DR. TOIVO FORSSTROM, FOR DEFENDANT.

DR. TOIVO FORSSTROM, a witness on behalf of defendant, after being first duly sworn, testified as follows:

I am a regularly licensed and practicing physician in Oregon, where I have been practicing since 1905. I reside at Astoria, Oregon. I was acquainted with decedent Anton Stipcich during his lifetime. I operated on him for a gastric ulcer January 13, 1922, and he consulted me after that.

Q. There have been introduced in evidence here two documents of which this paper I hand you is

(Testimony of Dr. Toivo Forsstrom.)

a copy. They are marked Defendant's Exhibits "C" and "D." Will you look them over. Are those correct copies of prescriptions given by you to Mr. Anton Stipcich? A. Yes, sir. [77]

Q. And Mr. Stipcich consulted you at that time?

A. Yes, he came to my office and complained of a—that he had trouble with his stomach for a time; he had a little pain after eating, and of course he was working all the time, and I didn't consider it very much. He had been healthy,—perfectly healthy since I operated on him two years and a half ago. I knew for a fact that he had been working, and he came to the office and said that he had felt a little pain after eating, distress, distressed feeling, so I just wrote him a prescription. I thought there might be something in the gastric juice. I didn't think much about it. And I just saw him that once, and then some time he came back and he said he still felt a little pain there.

Q. How long was it he came back from this February 16th?

A. I couldn't say exactly the date. We were just talking a few words in the office. I told him that if the distress got worse he ought to have an X-ray picture taken; that my X-ray machine was out of order, so I couldn't do it myself. So the next thing I heard about it he had went to Portland and come back to me, but it was several weeks, over a month. Afterwards he came back and told me he had consulted a physician in Portland, and he had taken an X-ray picture of him, and also

(Testimony of Dr. Toivo Forsstrom.)

told him that he thought there was another ulcer had formed.

Q. Told you that the physician had reported that Stipcich thought another ulcer?

A. No, the physician told Stipcich; that physician who examined him, told him was another ulcer, and told him he had to be operated on.

Q. That he had to be operated on?

A. So he asked me my advice, and I told him, "That physician he is all right, you can depend upon him. I knew him personally very well," and said, "You can put your life in his hands all right."

Q. You advised the operation?

A. Yes; I didn't know the details. [78]

Q. I mean you advised him to submit to an operation? A. Yes.

Q. Who was the other physician, Doctor?

A. Dr. E. A. Sommer.

Q. You don't remember the date of that?

A. No, I don't. We were just talking. I was very busy in the office, and he just came in and asked my advice, and I told him that if Dr. Sommer told that advice, you can depend on it, it is so, because he told him the truth; and the next I heard about it Stipcich was dead.

Q. How long was it—do you remember how long after he consulted you that you heard he was dead?

A. Might have been a week or two afterwards. So I called up Dr. Sommer over the phone and

(Testimony of Dr. Toivo Forsstrom.)

asked about the operation, and he told me what it was.

Q. You furnished the proof of death—furnished a document to the Metropolitan Life Insurance Company at their request, which I hand you, marked Defendant's Exhibit "A" for Identification. Is that a document which you furnished at that time? A. Yes, that is my writing.

Q. And it is stated in that document that the date of your first attendance in Mr. Stipcich's last illness was February 10th?

A. Yes. At that time I told the party who came to ask me that I had no records, that I couldn't remember; and he said, "Well, it must have been about that time"; if you say it was that time, I told him; I didn't have any records of it; the only record later on I saw at the drugstore that my prescription was dated February 16th.

Q. Then February 16th is the date to which you refer in that document erroneously as February 10th?

A. Yes, sir. I am acquainted with the statistics of results of operations for gastric or peptic ulcers. I think the mortality depends upon who [79] is the surgeon. I cannot tell exactly, but I think the average mortality must be very near four or five per cent.

Cross-examination.

(Questions by Mr. FULTON.)

Q. You had known Anton Stipcich, you say, Doctor, for several years? A. Yes.

(Testimony of Dr. Toivo Forsstrom.)

Q. What sort of a looking man was he?

A. Oh, he was a healthy man; he was a healthy man. Tall, muscular fellow,—hard-working man.

Q. And this day that he called upon you at your office, what was your judgment of the condition of his health?

A. His health had been perfect since I operated, and he didn't—he looked perfectly as well as before. The only thing, as I mentioned, was that he complained of some distressed feeling after eating, some pain.

Q. Is this distressed feeling after one has eaten, is that an uncommon complaint? A. No.

Q. And you wrote out for him a prescription?

A. Yes.

Q. Well, unfortunately referring to it yesterday, I was a little abrupt, I am frank to say. What was that, just an ordinary laxative?

A. I think that prescription contained hydrochloric acid, pepsin, and a little peppermint water, and glycerin, then I added a little morphine preparation, morphine to relieve that pain.

Q. What was the object of giving it?

A. Just to aid the digestion; the same constituents as the gastric juices, hydrochloric acid and pepsin.

Q. What did you tell him at that time?

A. I didn't make any examination of him at all. Just talking, and I questioned him and asked a few questions, and I just wrote that and said, "If you don't feel relieved you let me know." [80]

(Testimony of Dr. Toivo Forsstrom.)

Q. Did you tell him you felt there was nothing wrong with him, he was all right?

A. I couldn't see anything wrong.

Q. Did you tell him that?

A. Yes, I told him I didn't think it amounted to much.

Q. And so you gave him this?

A. The man was working.

Q. Working right then, right along? A. Yes.

Q. What was he working at?

A. He was a brick-mason.

Q. How long after that did he continue to work, or do you know? A. I don't know.

Q. Now you say that some time after that he came down and wanted you to take some X-ray pictures? A. Yes, it was my suggestion.

Q. Your suggestion he came down. The object of taking the X-ray pictures was what?

A. Was to see if there should have been—I know what I have operated on him for, and I wanted to see if there possibly could be some recurrence of it, of that ailment he had had.

Q. And you advised him then to come to Portland?

A. No. I told him at that time my X-ray machine was out of order and I couldn't do it myself, and he either had an X-ray picture taken at the hospital that had a machine there, or came to Portland. That is all right there.

Q. Did you see the X-ray pictures?

A. No, sir.

(Testimony of Dr. Toivo Forsstrom.)

Q. But you say he was in your office some time prior to the date of his death?

A. Yes, after—

Q. After he had taken the X-ray picture?

A. Yes, after he had made the trip to Portland.

Q. And got the X-ray picture? [81]

A. Yes. He came to my office and he told me he had had pictures taken here and consulted a surgeon here, and he advised him to be operated.

Q. Now, you think that was over a day or two, or three or four days before he died?

A. Oh, yes, more than that.

Q. Are you sure of that, Doctor?

A. Yes, I think it was, because I don't think he went—might have been about a week or so passed after that time.

Q. But it was after he had his X-ray pictures taken? A. That he came to me.

Q. How long after,—do you know?

A. I couldn't tell you exactly; he didn't mention the date; very likely it was a few days after; very likely it was a few days after; I didn't ask him.

Q. You are not certain about this; it has been some time ago, Doctor, you are not certain?

A. No, I couldn't say.

Upon redirect examination, said witness testified as follows:

(Questions by Mr. MONTAGUE.)

Q. Just a word, Doctor. You suggested to Mr. Stipcich when he came to see you if the pain didn't subside he should come again?

(Testimony of Dr. Toivo Forsstrom.)

A. Yes. I told him if he didn't get relief from this medicine I gave him, because at the time I considered that as just a little trifle; naturally I should think there would be some recurrence of it, because I knew what had been before.

Q. That occurred to your mind, might be a recurrence? A. Yes, but never mentioned to him.

Q. Do you know how long he had been suffering pain at the time he first came to you?

A. No, he didn't say, but some time.

TESTIMONY OF DR. E. A. SOMMER, FOR DEFENDANT.

Dr. E. A. SOMMER, a witness on behalf of defendant, after being first duly sworn, testified as follows:

I am a regularly licensed physician and surgeon in Oregon, and I have been practicing my profession since 1880. I have had extensive practice in surgery. [82]

I was acquainted with the decedent Anton Stipcich during his lifetime. He was in my office on March 7th or 8th, 1924—I do not recall the exact date—whether he called on the 7th and went to the hospital on the 8th, I am not sure, but on the 8th I started his examination,—that is, on that date, I sent him to St. Vincent's Hospital, at Portland, Oregon, where I had him examined for gastro-intestinal examination. I examined him myself. He left the hospital again on March 14, 1924, and I made a diagnosis of a duodenal ulcer.

(Testimony of Dr. E. A. Sommer.)

Q. And what was your advice to Stipcich?

A. My advice to him was that as these ulcers of the type he had at that time were lifelong disturbances unless they were healed, that I felt that it was an operative procedure instead of medical. I advised him that he could live a long time with it, or he might have trouble at any time; that he had had trouble before, and I advised surgical interference. Back of this condition, ulcers heal and ulcers break down, and from the history here I had every reason to feel that the primary ulcer for which he was operated on, and from our experience we have in perforated ulcers, that when they perforate they heal, a large percentage of them, and that he might have a new ulcer develop. It is an uncommon condition that people who have been operated on and a gastro-enterostomy performed that they are not always perfectly well after an operation of that type; that is, they may have gastric symptoms; symptoms of distress, or symptoms of disturbances following an operation even without an ulcer being present. The ulcer here was excised and this opening made. He had an ulcer on the posterior surface of the duodenum when I went in.

Q. Were you through, Doctor? I don't want to interrupt. Subsequently you performed an operation on Mr. Stipich? A. I did; yes.

Q. And your operation—what was disclosed by your operation with respect to confirming or modifying your diagnosis?

A. That corroborated our diagnosis. [83]

(Testimony of Dr. E. A. Sommer.)

Q. Was there at the time you made the diagnosis evidence of a fresh stoppage, or any stoppage, of the fluid contents of the stomach into the intestines?

A. He had this ulcer here. (Referring to diagram in blackboard not preserved.) This represents the lower intestines; this the stomach and this the duodenum. The opening that was made by Dr. Forrstron here, with the excision of the ulcer, taking out, cutting out the ulcer, he evidently functioned for a long time perfectly properly, because this opening closed up.

Q. The opening that was made by the operation closed up?

A. By the primary operation, virtually closed up. Scar tissue around there very small, and that is what we claim didn't function. In the X-ray picture taken—we were concerned in this operation, concerned with the ulcer here; was the same type ulcer that he had originally only in a different place, which had perforated, but had perforated not as it had before; started from here, and allowed the contents to pour freely into the abdomen. We knew one operation which had been operated on; we didn't know how many he had; whether had more than the primary and secondary, or whether had others, and adhesions now, that is the perforation had attached itself to the liver. Reopening of the gastro-enterostomy, and the opening here, with another ulcer having formed here would not be proof that he might not have developed another

(Testimony of Dr. E. A. Sommer.)

one had he lived, by opening this portion here, because in the present light of gastric surgery—this portion from here on to the third portion—this part about here, is what we call the ulcer-bearing area of the stomach, and if you open—make an opening here to relieve the stomach, draining it, that does not relieve the definite cause that produces the ulcer. A matter of constitutional condition. We don't know; we think at times we can tell, but we don't know the cause definitely that produces an ulcer in the stomach, because we operate on them and they are well, and they return again with an ulcer. So in modern science—art as we wish to call it—we have discovered that if we remove this part of the stomach, get down to a certain portion of the second [84] part of the duodenum, the ulcers are very few in this third portion. They are very common in the first and second portions.

Q. The first portion of the stomach and the second of the duodenum?

A. The first portion of the duodenum and the second portion of the duodenum. We put the stomach here, the pyloric here; in through here is the ulcer-bearing area. If we can resect, take off this, take it all off here and attach this part to this part of the bowel, these people do not have a recurrence as a rule. The mortality for your operations for ulcers runs from two and a half to fifty per cent.

Q. From two and a half to fifty per cent?

A. From two and a half to fifty per cent. If

(Testimony of Dr. E. A. Sommer.)

you have a simple peptic ulcer here and have a gastro-enterostomy done it will not be more than two and a half per cent. No person can tell. No person can tell at the time he goes in what he is going to meet. This condition here, he had an ulcer in the duodenum, duodenal ulcer. People can live with them, twenty, twenty-five or thirty years, have them all their lives and die from some other causes. But where you have a perforation, as you had in this case here, posterior of the liver, our mortality jumps very high, because we had an ulcer bed in here and by removing this, we evidently had an infection which produced peritonitis, from which he died.

Q. That complication in a certain percentage of cases is inevitable with the best surgery that has yet been discovered, is it not, Doctor?

A. Every man that does that has to experience these unfortunate results.

Witness identified Plaintiff's Exhibit 20 as having been made in his office. [85]

TESTIMONY OF DR. EDWARD B. WAFFLE, FOR DEFENDANT.

DR. EDWARD B. WAFFLE, a witness on behalf of defendant, after being first duly sworn, testified as follows:

I am a regularly licensed physician and surgeon in Oregon, and have been such for seventeen years. I reside at Astoria, Oregon, and am engaged in active practice there. I was one of the examiners

(Testimony of Dr. Edward B. Waffle.)

for the Metropolitan Life Insurance Company at Astoria, Oregon, during the year 1924. I remember taking the application of Anton Stipcich for life insurance. I identify Defendant's Exhibit "B" as the application that was made out at that time (copy attached to complaint). The application contains Sheet "A" made and signed by the applicant. Sheet "B," applicant's statement to the medical examiner, which is not signed by the applicant. I made the statements and answers exactly as they were given to me by Stipcich. The questions and answers cover the entire conversation had between Mr. Stipcich and myself. I made no X ray or other examination of him. My examination was simply a physical examination. At the time I made the examination, I found no evidence of the existence at that time of an ulcer, that is, from the character of the examination that I made. The average mortality in cases of an ulcer, such as described in this case, that is, an operation for an ulcer, depends upon the clinic's and the operating surgeon's ability—said to be from two per cent to five per cent. Subsequent call about two weeks after; submitted specimen.

TESTIMONY OF ARTHUR A. HOFFMAN, FOR DEFENDANT (RECALLED).

ARTHUR A. HOFFMAN, a witness previously sworn, was recalled and testified in response to interrogatories propounded to him by counsel for defendant as follows:

(Testimony of Arthur A. Hoffman.)

Q. I believe you testified you are manager of the office at Astoria? A. Yes, sir.

Q. Did the office at Astoria have any information concerning the visits of Mr. Stipcich to Portland, his consultation with physicians, or his having X-rays? A. It did not. [86]

Cross-examination.

(Questions by Mr. FULTON.)

Q. That is the office at Astoria? A. Yes.

Q. You are only speaking for the Astoria office?

A. Yes.

Q. What is the fact as to the procedure in your office with respect to making reports of business originating or arising there, to the home office?

A. Any matters that come up whatever in connection with the Home Office, I mail them and send them away myself. There is no one else in the office there who handles that at all. I receive and deliver all mail, so if there was any reports coming in or going out they go through me, no one else.

Recross-examination.

(Questions by Mr. FULTON.)

Q. Were you in the city of Astoria between March 17th and April 26th? A. March 17th

Q. 1924?

A. And April 26th.

Q. February 18th, 1924, and March 26th, 1924.

A. I couldn't say.

Q. What? A. I don't recall.

(Testimony of Arthur A. Hoffman.)

Q. You don't remember whether you were gone or there all the time or not? A. I don't recall.

Q. Mr. Hoffman, under the practice of the company, would you have delivered the policy to Mr. Stipcich if you had known at the time the policy was ready to be delivered that he had been to Portland, consulted physicians, been some six days in the hospital, had an X-ray picture taken and been advised to submit to an operation? [87]

To which question plaintiff objected as calling for a conclusion. Objection overruled and exception allowed.

A. I am instructed by the company that if there is anything coming up in that nature to write them for instructions.

Mr. FULTON.—Is that in writing or verbal?

A. We have a circular letter that comes down to us and we have a rate book. The instructions are in printing.

Objection renewed. Defendant consents that answer may be stricken out.

Q. What is the practice?

A. Under the practice of the company as observed and carried out, what would you have done in respect to the delivery of this policy, if you had been informed of the facts which I mention?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled, exception saved.

A. Wired head office and waited instructions.

Q. Do you know what would have been done in

(Testimony of Arthur A. Hoffman.)

der the practice of the head office as to delivery of the policy?

Objection renewed, overruled, exception saved.

A. I think the company would have instructed me to return the policy to the head office.

Recross-examination.

(Questions by Mr. FULTON.)

Q. Would you be kind enough to tell us, Mr. Hoffman, how many cases of this kind have come up to you while you have been in Astoria,—similar to this?

A. None that I recall similar to this.

Q. You never had any other experience of this kind before? A. Not personally. No.

Whereupon counsel for plaintiff moved to strike out the testimony on the grounds that it was incompetent, irrelevant and immaterial.

COURT.—As I said a moment ago, I think the question is wholly immaterial. A question of law. If conditions had changed so [88] that the company was not obliged to deliver the policy, then it doesn't make any difference what the practice of the company was.

The defendant produced evidence of the tender pleaded in its answer, the tender being admitted as alleged.

Thereupon the defendant rested.

The plaintiff thereupon produced the following testimony in rebuttal.

TESTIMONY OF MRS. JOSEPHINE STIPCICH, FOR PLAINTIFF (IN REBUTTAL).

(Questions by Mr. FULTON.)

Mrs. Josephine Stipcich:

Q. You have testified you are the plaintiff in this case once before, and that you were the wife and are now the widow of Anton Stipcich, deceased?

A. Yes.

Q. Who had this policy? What was the name of the agent who solicited this policy?

A. Julien Coblentz.

COURT.—We will take that for granted. He testified so we do not need to take up any time on that question.

Q. Were you with your husband when he was in Portland? A. Yes.

Q. And had the X-rays taken?

A. No, I wasn't with him when he had the X-rays taken, but I came up afterwards.

Q. And did you have a talk with Dr. Sommer while your husband was present?

A. Yes, had a conversation.

Q. What was it that Dr. Sommer said to him at that time?

A. Dr. Sommer told me that my husband was in good physical condition. [89]

Q. Your husband was present?

A. Yes, my husband was there. That was before he made up his mind to have the operation. He told me his condition was not serious, he was in

(Testimony of Mrs. Josephine Stipcich.)

good physical condition and he better go, and then he made his mind up and went.

Q. Did Dr. Sommer tell your husband, or you, in your husband's presence, what was the matter with him?

A. No, he told me that it was something wrong; he didn't mention ulcer; he said it might be an ulcer but he didn't know. It was something, but it wasn't very much, but it might give him trouble later, or when he gets older, and he'd better go right then.

Q. Did Dr. Sommer say anything about the old operation, the former operation that Drs. Forsstrom and Finch had performed?

A. Yes; he told me that it might cause trouble from his first operation.

Q. Do you recall when your husband returned after he had had X-ray pictures taken? Do you recall when he came back to Astoria?

A. What is it?

Q. He was up to Portland, you know, and visited Dr. Sommer. A. Yes.

Q. And do you remember when he came back?

A. Yes.

Q. Do you remember what date it was?

A. No, I don't remember the date.

Q. But he did make a trip back to Astoria?

A. Yes.

Q. And then came back for the operation?

A. No, then he went to Dr. Coffey.

A. Mr. Coblentz was up to the house to talk things over, I told him the condition of my hus-

(Testimony of Mrs. Josephine Stipcich.)

band; my husband told me so. He told me not to take the advice from one doctor, to go and consult Dr. Coffey, because he was the best surgeon in Portland.

Q. You told Mr. Coblentz? A. Yes. [90]

Q. What did you tell Mr. Coblentz?

A. I told him the condition of my husband.

Q. What was that?

A. Dr. Sommer told him to come—

Q. That he had this ulcer? A. Yes.

Q. Now, what was it that Dr. Sommer said to you in that conversation you had with him when your husband was present?

A. Dr. Sommer told me that my husband might have an ulcer and may not; that he may cause—trouble may come from his first operation. He recommended surgical; it wasn't going to be serious. He was in good physical condition; that he was going to be all right. It might be an ulcer; wouldn't amount to very much.

Q. Now, after you got that, after Dr. Sommer had told you that your husband may, or he may not have an ulcer, did you have any talk with Mr. Coblentz, of the insurance company? If so, state what it was. A. With Mr. Coblentz.

Mr. MONTAGUE.—If that is intended to bind the insurance company, I object to the testimony on the ground that information to Mr. Coblentz, under the terms of the policy and rules of the agency would not in any way bind the company.

COURT.—Would not be notice to the company, because he was a mere soliciting agent.

Mr. MONTAGUE.—That is the point. And if that is the direction of this testimony, I move to have that part stricken out. This is the first time that Mr. Fulton has mentioned the company in that connection.

COURT.—Evidence as to statements to Coblentz might be competent as showing whether they realized there was any serious difficulty.

COURT.—It seems to me, that in view of this application and policy and the fact that it appears on the face of the [91] application that that was the intention, that statements made to or by an agent should not be binding on the company unless contained in the application, that mere knowledge by a soliciting agent who had no authority to deliver the policy or issue it, and whose duty it was simply to take the application and forward it to the Home Office, the Manager, or somebody that had authority to issue it, that notice to such an agent did not bring that notice to the company. I may be in error, but that is my view of the law at this time, therefore I sustain this objection.

To which ruling of the Court, the plaintiff, by her attorneys, duly excepted, and the exception was allowed by the Court.

Thereupon plaintiff, by her attorney, made the following offer of proof:

Mr. FULTON.—That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and the

(Testimony of Mrs. Josephine Stipeich.)

X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time, Mr. Julien Coblentz was agent for the defendant company. But the Court refused such offer, and did not permit the witness to answer. To which ruling of the Court the plaintiff, by her attorney, then and there excepted, and the exception was allowed by the Court.

Q. Now, after Dr. Sommer had made this examination of your husband, had taken these X-ray pictures, did you go to any other doctors?

A. He went to Dr. Coffey afterwards. [92]

Counsel for plaintiff then asked the witness the following questions:

Q. Don't answer this question until the objection is made. Who suggested that you should go to see Dr. Coffey?

Mr. MONTAGUE.—That is objected to. I don't think it is material at all who suggested going to see Dr. Coffey. The same proposition anyway.

The COURT.—That is for the purpose of showing Coblentz suggested it, I suppose?

Mr. FULTON.—That is what I was trying to get at. The Court sustained said objection and refused to permit the witness to answer same. To which ruling of the Court, the plaintiff, by her at-

(Testimony of Mrs. Josephine Stipcich.)

torney, then and there excepted, and the exception was allowed by the Court.

Counsel for plaintiff made the following offer of proof:

Mr. FULTON.—If the witness were permitted to answer that question, she would state that her husband went to Dr. Coffey at the suggestion of Mr. Coblentz.

But the Court refused such offer, and did not permit the witness to answer. To which ruling of the Court, the plaintiff, by her attorney, then and there excepted, and the exception was allowed by the Court.

Q. Now, Mrs. Stipcich, did you go to Dr. Coffey?

A. Yes.

Q. What did Dr. Coffey do? Did Dr. Coffey examine him? A. He took an X-ray.

Q. He took an X-ray?

Q. What advice did Dr. Coffey give at that time, what did he say about your husband's condition?

A. Similar advice as Dr. Sommer did.

Q. What did he say in regard to whether a serious operation or otherwise?

A. No, he told me was not serious.

Q. What did he say? What were the words he used, if you remember? [93]

A. The same words as Dr. Sommer. He told me the same thing Dr. Sommer did.

Q. I know. What did he say?

A. My husband was in good physical condition; he was a strong man and his operation would not amount to much, it was not serious.

(Testimony of Mrs. Josephine Stipeich.)

Cross-examination.

(Questions by Mr. MONTAGUE.)

Q. When did you first come to Portland after you got out this application?

A. I don't know, I don't remember the date.

Q. Well, it was early in March, wasn't it?

A. Yes, March 26th, I think it was.

Q. The first time?

A. When I came with my husband.

Q. That was the first time you came with your husband? A. Yes, when I came with him.

Q. Well, Mrs Stipeich, the evidence here shows that your husband came to Portland about March 7th, or March 8th, the first time.

A. He came alone. [94]

Q. You didn't go with him that time, and you didn't hear any conversations that took place at that time? A. No, but I heard afterwards.

Q. Well, that is another story. The evidence also shows that on March 20th your husband went to Dr. Coffey's office, and that Dr. Stater examined him there. Were you with him at that time?

A. No, I came afterwards.

Q. You came afterwards? A. Yes.

Q. And you were not here then the week of March 7th, or the time, whenever it was, that he came subsequently and went to Dr. Coffey's office?

A. No.

Q. The first time you came was when he came—

A. March 26th.

(Testimony of Mrs. Josephine Stipcich.)

Q. March 26th. And then you went to Dr. Coffey's office March 26th or a day or two after that?

A. No, we didn't go right away. He didn't make up his mind he was going to have the operation yet. We were here twelve days before he made his mind to have the operation.

Q. Twelve days? A. Eight or ten.

Q. The operation was on April 3d, wasn't it?

A. 5th.

Q. I beg pardon. Went to the hospital on April 3d? A. Yes, in the hospital.

Q. That was eight days after. He was eight days making up his mind. Did he go to visit other doctors? A. No.

Q. Nobody but Dr. Coffey?

A. And Sommer.

Q. And you didn't come to Portland, from Astoria to Portland at all, until March 26th?

A. No. [95]

Q. How did you happen to go to the office of the Insurance Company on Saturday, March 16th, do you know? A. March 16th?

Q. February 16th,—I beg your pardon, February 16th.

Q. Mrs. Stipcich, will you look at this paper I hand you, marked Plaintiff's Exhibit 2A, and see if that is your signature down there at the bottom?

A. Yes.

Q. And this was made up for you by—in the Metropolitan office, was it, or was it there you were staying? A. Where?

(Testimony of Mrs. Josephine Stipcich.)

Q. This was made out and you signed it at home, didn't you?

A. Well, either home or the office; I can't remember.

Q. You can't remember whether at home or in the office? A. No.

Q. You gave the answers that were written down there, didn't you? A. Yes.

Q. Well, how did you happen to say, in answer to Question 11, which question asks the names of every physician who attended the deceased during his last illness and during two years prior to death, that Dr. Sommer did, and that the first date of their attendance was March 31st. How did you come to say that when you knew that Mr. Stipcich had gone to Portland and consulted not only Dr. Sommer, but Dr. Coffey, and that he came here March 7th and again on March 20th?

A. Well, I don't know, maybe I wasn't positive, but—I don't know why they should put that date. Maybe I didn't know that date. I don't know why that date is there.

Q. That is the date you gave, isn't it? You gave that date, didn't you? A. March 31st?

Q. Yes. [86]

A. Well, I don't know whether I did or not.

Q. You can't say you didn't, can you?

A. Well, I can't deny it; I don't know.

COURT.—Did I understand you to say the first time you were in Portland with your husband was March 26th? A. Yes.

(Testimony of Mrs. Josephine Stipcich.)

COURT.—Then I assume that the conversation that you had with Dr. Sommer was on that date or later? A. It was later.

COURT.—It was later than that?

A. Maybe it was a few days later, yes. We didn't go to see him right away.

COURT.—How about the conversation you had with Dr. Coffey?

A. Well, I went to—my husband didn't know which doctor he was going to—

COURT.—I know. But about the time? It was after the 26th? A. Yes, after the 26th.

Mr. MONTAGUE.—I think I would like to present a motion for a directed verdict at this time, and I presume that the jury may take a recess while we are discussing it.

COURT.—This policy, or this application, provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The policy was issued on the 26th of March. The date of delivery has not been shown by the testimony, but assuming that it was delivered on that day—but there is no proof on that subject—I understand the law to be, and so stated on the demurrer, that if this application and policy were to take effect from the date of its issue, the obligation of the applicant to make full disclosure of his physical condition continues to the completion of the contract, that would be down to the issuance of the policy, and any material change

in the condition of his health before the consummation of the contract, before the issuance of the policy in this case, should have been reported to the company. [97]

Now the evidence shows, and I don't see that there is any room for controversy about it, that soon after this application was made the applicant appeared here in Portland and consulted Dr. Sommer about his physical condition, and after an examination, and being under observation for five or six days, the doctor advised that he probably had an ulcer, or concluded that he probably had an ulcer, and so advised the applicant, and advised him to submit to an operation. Now, he wasn't satisfied with that, so he went to another physician along about the 20th of March, and obtained the same information, and that certainly was enough to advise him of the change in the condition of his health, and it was information that I think he was obliged and in duty bound to communicate to the insurance company, because if he had communicated it to the company that after the application he had consulted a physician and been advised he was afflicted with an ulcer, and to submit to an operation, it would be up to the company to determine whether or not it would issue the policy, but it was his duty to communicate that fact to the company, and not having done so, or if he didn't do so, it would seem to me that would void the policy.

Now, on the question of whether he did or not, there is no direct evidence, but there is evidence by the manager at Astoria, that no such communica-

tion was made to him, or through his office to the company, and in addition to that the company issued and delivered the policy, based upon the original application, and upon the original application, and attached to the policy were particular declarations that it was acting upon that application alone. So I think it would be futile for the Court to hold that there was any proof on this contention that this condition of the applicant had been in fact communicated to the company. So if I am right in my interpretation of the law covering contracts of insurance of this kind, it seems to me there is no escape from the conclusion that the motion for a directed verdict in favor of the company should be allowed. An insurance company has [98] a right under the law to be advised of the condition of the health of its applicants at the time it makes the contract, and that was not done in this case. Whatever the purpose of this gentleman may have been in these inquiries at the time and under the circumstances, and not communicating to the company his condition, but waited until after the policy had been issued before he went to the hospital for the operation, is wholly beside the question involved in this case. So I take it that under the record as it appears, the Court has no alternative but to allow this motion.

Thereupon, the Court instructed the jury to bring in a verdict in favor of the defendant. To which ruling of the Court the plaintiff, by her attorney, excepted, and the exception was allowed by the Court.

The jury thereupon, under such instructions, forthwith brought in a verdict in favor of defendant and against plaintiff, and the same was duly received and filed, and judgment entered thereon, to all of which the plaintiff excepted, and the exception was allowed by the Court. [99]

And the plaintiff prays that this bill of exceptions may be settled, allowed and approved.

G. C. & A. C. FULTON,
B.,
Attorneys for Plaintiff.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, Robert S. Bean, Judge of the United States District Court for the District of Oregon, before whom the above-entitled cause was tried, hereby certify that on this 9th day of December, A. D. 1925, and within the time allowed by the order of this Court the above and foregoing bill of exceptions was duly filed and tendered, and the same has been duly examined by the Court and counsel, after due notice to counsel for the defendant, and the same is hereby settled, allowed and approved as the bill of exceptions in this action, and the same is ordered to be filed and made a part of the records herein.

It is further certified that said bill of exceptions contains all of the testimony and evidence produced and offered at and during the trial of said cause pertaining and relevant to the questions presented in this appeal, all of the rulings of the Court as to

the law of the case and the admission and rejection of evidence and all the instructions given by the Court to the jury, pertaining and relevant thereto, and as supplementary thereto there is hereto attached, marked Exhibit "X," a transcript of the official stenographer's notes of all proceedings had, done and taken at such trial.

R. S. BEAN,
District Judge.

Filed December 10, 1925. [100]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a stipulation relative to bill of exceptions, in words and figures as follows, to wit: [101]

[Title of Court and Cause.]

STIPULATION WAIVING PRINTING PART OF BILL OF EXCEPTIONS.

IT IS STIPULATED between the parties hereto as follows, that is to say, it is believed that the bill of exceptions prepared and signed by the Court contains all of the record in this case that is pertinent and relevant to and covers all questions presented by the appeal, but in order to avoid any controversy as to the actual testimony and evidence produced, there has been attached to the bill of exceptions, and forms a part thereof, a transcript of the stenographer's notes taken at the trial. For that reason it is agreed that the transcript of the

stenographer's notes need not be copies as part of this transcript or printed, neither shall any of the exhibits except those mentioned in the original bill of exceptions be printed, but all shall be sent up separately. Of course the transcript of the stenographer's notes shall be attached to and form a part of the original bill of exceptions.

Dated this 9th day of December, 1925.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendant.

Filed December 9, 1925. [102]

AND AFTERWARDS, to wit, on the 9th day of December, 1925, there was duly filed in said court a stipulation to send original exhibits to the United States Circuit Court of Appeals, in words and figures as follows, to wit: [103]

[Title of Court and Cause.]

STIPULATION WAIVING PRINTING ORIGINAL EXHIBITS.

IT IS STIPULATED that the originals of plaintiff's Exhibits 2A, 2B and 2C and the original of Defendant's Exhibit "B" and Exhibit "X" be forwarded to the United States Court of Appeals as a part of the bill of exceptions but need not be printed, but shall have the same force and effect as if printed.

Dated this 9th day of December, 1925.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

WOOD, MONTAGUE & MATTHIESSEN,
Attorneys for Defendant.

Filed December 9, 1925. [104]

AND AFTERWARDS, to wit, on the 16th day of December, 1925, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [105]

[Title of Court and Cause.]

PRAECIPE DESIGNATING PARTS OF RECORD TO BE INCLUDED IN TRANSCRIPT ON WRIT OF ERROR.

To the Clerk:

You are directed to make a transcript of record in this cause to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the writ of error allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers, to wit:

(1) Complaint.
(2) Order of Circuit Court for Clatsop County, removing the cause to this court.
(3) Answer.
(4) Reply.
(5) Judgment.
(6) Order extending time for plaintiff to file a motion for a new trial.

(7) Motion for new trial.
(8) Order overruling motion for new trial.
(9) Opinion of Court overruling motion for new trial.
(10) First order extending time to file bill of exceptions.
(11) Second order extending time to file bill of exceptions.
(12) Bill of exceptions.
(13) Stipulation waiving printing of exhibits.
(14) Stipulation waiving printing part of bill of exceptions.
(15) Petition for writ of error and allowance.
(16) Assignments of error, proof of service.
(17) Bond for writ, and approval.
(18) Writ of error and proof of service.
(19) Citation, proof of service.

G. C. & A. C. FULTON,
Attorneys for Plaintiff.

Copy served on attorney for defendant by mail Dec. 15, 1925.

G. C. FULTON,
Attorney for Plaintiff.

Filed December 16, 1925. [106]

AND AFTERWARDS, to wit, on Friday, the 15th, day of January, 1926, the same being the 63d judicial day of the regular November term of said Court,—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [107]

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 15, 1926—ORDER RE FORWARDING OF ORIGINAL EXHIBITS.

Pursuant to the stipulation of the parties filed herein,—

IT IS ORDERED that the Clerk of this court send to the United States Circuit Court of Appeals for the Ninth Circuit, with the transcript of record on writ of error in this cause, all of the exhibits in this cause.

R. S. BEAN,
Judge.

Filed January 15, 1926. [108]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the annexed writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from three to one hundred and eight inclusive, constitute the transcript of record upon

said writ of error in a case in said court in which Josephine Stipcich is plaintiff and plaintiff in error, and Metropolitan Life Insurance Company is defendant and defendant in error; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said plaintiff in error and is a full, true, and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $42.65 and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 26th day of January, 1926.

[Seal] G. H. MARSH,
Clerk. [109]

[Endorsed]: No. 4764. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Stipcich, Plaintiff in Error, vs. Metropolitan Life Insurance Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed January 28, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY (a Corporation),

Defendant in Error.

STATEMENT OF ERRORS UPON WHICH PLAINTIFF IN ERROR INTENDS TO RELY.

Plaintiff in error hereby files a statement of errors upon which she intends to rely, to reverse the judgment entered in the court below.

(1) The Court erred in sustaining and in not overruling the objection of counsel for defendant to and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

> Q. Now, after you got that, after Dr. Sommer had told you that your husband may or he may not have an ulcer, did you have any talk with Mr. Coblentz, of the insurance company? If so, state what it was.

(2) The Court erred in denying and rejecting the following offer of proof, being an offer of proof made in response to the question set forth in Assignment of Error No. 1 hereof, and in not permitting

the plaintiff Josephine Stipcich, whilst a witness in her own behalf to produce the following testimony, to wit:

> That if the witness were permitted to answer the question propounded and such question as would properly bring this matter out, she would testify as follows: That after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the doctor had recommended an operation, possibly for an ulcer; that the doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time, Mr. Julien Coblentz was agent for the defendant company.

(3) The Court erred in sustaining and in not overruling the objection of counsel for the defendant to, and in not permitting plaintiff Josephine Stipcich, whilst a witness in her own behalf, to answer the following question propounded to her by her counsel, to wit:

> Q. Who suggested that you should go to see Dr. Coffey?

(4) The Court erred in denying and rejecting the following offer of proof and in not permitting the plaintiff Josephine Stipcich, whilst a witness in her own behalf, to testify to the following facts, being the offer of proof in response to the ques-

tion set forth in Assignment of Error No. 3 above, namely:

> If the witness were permitted to answer that question, she would state that her husband went to Dr. Coffey at the suggestion of Mr. Coblentz.

(5) The Court erred in granting and in not overruling the motion of defendant for an order directing the jury to return a verdict in favor of the defendant.

(6) The Court erred in taking from the jury the right to pass upon the issues of fact in this case.

(7) The Court erred in instructing the jury to bring in a verdict in favor of the defendant and against the plaintiff.

(8) The Court erred in entering a judgment in favor of the defendant and against plaintiff.

(9) The Court erred in adjudging and declaring the following to be the law of the case, namely:

> It seems to me, that in view of this application and policy and the fact that it appears on the face of the application that was the intention, that statements made to or by an agent should not be binding on the company unless contained in the application, that mere knowledge by a soliciting agent who had no authority to deliver the policy or issue it, and whose duty it was simply to take the application and forward it to the Home Office, the Manager, or somebody that had authority to issue it, that notice to such agent did not bring that notice to the Company. I may be in error, but that

is my view of the law at this time, therefore I sustain this objection.

(10) The Court erred in declaring and adjudging the following to be the law of this case, namely:

This policy, or this application, provides that the company shall incur no liability until the application has been received, approved, and the policy issued and delivered. The policy was issued on the 26th of March. The date of delivery has not been shown by the testimony, but assuming that it was delivered on that day—but there is no proof on that subject—I understand the law to be, and so stated on the demurrer, that if this application and policy were to take effect from the date of its issue, the obligation of the applicant to make full disclosure of his physical condition continues to the completion of the contract, that would be down to the issuance of the policy, and any material change in the condition of his health before the consummation of the contract, before the issuance of the policy in this case, should have been reported to the company.

Now, the evidence shows, and I don't see that there is any room for controversy about it, that soon after this application was made the applicant appeared here in Portland and consulted Dr. Sommer about his physical condition, and after an examination, and being under observation for five or six days, the doctor advised that he probably had an ulcer, or concluded that he probably had an ulcer, and so ad

vised the applicant, and advised him to submit to an operation. Now, he wasn't satisfied with that, so he went to another physician along about the 20th of March, and obtained the same information, and that certainly was enough to advise him of the change in the condition of his health, and it was information that I think he was obliged and in duty bound to communicate to the insurance company, because if he had communicated it to the company that after the application he had consulted a physician and been advised he was afflicted with an ulcer, and to submit to an operation, it would be up to the company to determine whether or not it would issue the policy, but it was his duty to communicate that fact to the company, and not having done so, or if he didn't do so, it would seem to me that would void the policy.

Now, on the question of whether he did or not, there is no direct evidence, but there is evidence by the manager at Astoria, that no such communication was made to him, or through his office to the company, and in addition to that the company issued and delivered the policy, based upon the original application, and upon the original application, and attached to the policy were particular declarations that it was acting upon that application alone. So that I think it would be futile for the Court to hold that there was any proof on this contention that this condition of the applicant had been in fact communicated to the

company. So if I am right in my interpretation of the law covering contracts of insurance of this kind, it seems to me there is no escape from the conclusion that the motion for a directed verdict in favor of the company should be allowed. An insurance company has a right under the law to be advised of the condition of the health of its applicants at the time it makes the contract, and that was not done in this case. Whatever the purpose of this gentleman may have been in these inquiries at the time and under the circumstances, and not communicating to the company his condition, but waited until after the policy had been issued before he went to the hospital for the operation, is wholly beside the question involved in this case. So I take it that under the record as it appears, the Court has no alternative but to allow this motion.

In addition to the above, the plaintiff in error designates the parts of the record which he thinks necessary for the consideration of such assignments of error, namely:

(1) Complaint.

(2) Order of Circuit Court for Clatsop County, removing the cause *of* the District Court of the United States for the District of Oregon.

(3) Answer.

(4) Reply.

(5) Judgment.

(6) Order extending time for plaintiff to file a motion for a new trial.

(7) Motion for new trial.

(8) Order overruling motion for new trial.

(9) Opinion of Court overruling motion for new trial.

(10) First order extending time to file bill of exceptions.

(11) Second order extending time to file bill of exceptions.

(12) Bill of exceptions.

The exhibits are not to be printed, for the reason that a stipulation has been signed between the parties waiving the printing thereof.

(13) Stipulation waiving printing of exhibits.

(14) Stipulation waiving printing part of bill of exceptions.

(15) Petition for writ of error and allowance.

(16) Assignments of error, proof of service.

(17) Bond for writ, and approval.

(18) Writ of error and proof of service.

(19) Citation, proof of service.

The above comprising the certified typewritten transcript of record certified to the above entitled court from the court below.

G. C. & A. C. FULTON,
Attorneys for Plaintiff in Error.

[Endorsed]: Statement of Errors upon Which Plaintiff in Error Intends to Rely. Filed Feb. 4, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy.

[Endorsed]: Printed Transcript of Record. Filed February 18, 1926. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4764

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF OREGON.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1925, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the 20th day of May, in the year of our Lord one thousand nine hundred and twenty-six. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

ORDER OF SUBMISSION.

ORDERED motion of defendant in error for dismissal of writ of error, heretofore filed, withdrawn.

FURTHER ORDERED cause argued by Mr. A. C. Fulton, counsel for the plaintiff in error, and by Mr. F. Eldred Boland, counsel for the defendant in error, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CERTIFYING A CERTAIN QUESTION OR PROPOSITION OF LAW TO THE SUPREME COURT OF THE UNITED STATES UNDER SECTION 239 OF THE JUDICIAL CODE.

Before GILBERT, HUNT, and RUDKIN, Circuit Judges.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"IT IS UNDERSTOOD AND AGREED:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of insurance, if one be issued.

"2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions:

* * *

"(c). A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in conse-

quence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X-ray should be taken. On March 7 or 8, he consulted a physician in Portland, Oregon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the

issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made in her behalf:

> "That if the witness were permitted to answer the questions propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at that time Mr. Julien Coblentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer therein referred to was one of the doctors consulted by the insured at Portland, Oregon. The Court below sustained an objection

to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the Court directed a verdict in favor of the defendant.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel, in view of the stipulations contained in the application for the insurance and more especially of the stipulation:

> "That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

WM. B. GILBERT,
WILLIAM H. HUNT,
FRANK H. RUDKIN,
United States Circuit Judges.

[Endorsed]: Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying a Certain Question or Proposition of Law to the Supreme Court of the United States Under Section 239 of the Judicial Code. Filed July 17, 1926. F. D. Monckton, Clerk. By Frank H. Schmid, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4764.

JOSEPHINE STIPCICH,

Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 35 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-eight (138) pages, numbered from and including 1 to and including 138, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error and certified under Sub. 3 of Rule 34 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of August, A. D. 1926.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

Supreme Court of the United States

Order to Send Up Entire Record and Cause—January 9, 1928

On consideration of the motion to send up the entire record in this cause, it is now here ordered that the said motion be, and the same is hereby, granted; and the Clerk is directed to notify the parties that the order setting the cause for hearing on January 16, 1928, is revoked and the cause is set down for hearing on March 5th next.